Supreme Court, U.S.
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No. 95-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JOHN CHARNEY, ALICE CHARNEY, JOHN CHARNEY, JR., AND BRIAN CHARNEY, a minor, by John Charney, his guardian,

Petitioners,

--v.--

ELAINE B. PANITZ,

Respondents.

Petition For a Writ of Certiorari To The Superior Court of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

KENNETH W. BEHREND
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Attorney for Petitioners

QUESTIONS PRESENTED

Whether absolute immunity for expert witnesses violates a civil litigant's Fifth and Fourteenth Amendments of the due process right to fairness of trial?

Whether the Superior Court of Pennsylvania violated the Fifth and Fourteenth Amendments by assessing a party counsel fees for appealing a case to the Superior Court when the controlling and deciding issue is an issue of first impression, and has never decided by the Supreme Court of Pennsylvania?

PARTIES TO THE PROCEEDING

The parties to the instant proceeding are set forth in the caption on the cover of this petition.

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JOHN CHARNEY, ALICE CHARNEY, JOHN CHARNEY, JR. and BRIAN CHARNEY, a minor, by John Charney, his guardian

Petitioners,

v.

ELAINE P. PANITZ,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPERIOR COURT OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI

Petitioners, John Charney, Alice Charney, and their sons, John Charney, Jr. and Brian Charney, respectfully pray that a writ of certiorari issue to the Superior Court of Pennsylvania to review a July 27, 1994 order affirming the order of the trial court and remanding for the trial court to assess attorney's fees.

OPINIONS BELOW

In an unreported opinion and order dated November 22, 1993, the Court of Common Pleas of Westmoreland County, Pennsylvania, Civil Division, granted respondents' Preliminary Objections in the Nature of Demurrer or Motion to Strike and dismissed petitioners' civil causes of action based on the absolute privilege protecting testimony at trial. *Charney v. Panitz*, No. 877 of 1993, 7a.[1] Also in unreported orders, the Superior Court of Pennsylvania, Pittsburgh District, affirmed the Judgment of the Court of Common Pleas on July 27, 1994. *Charney v. Panitz*, No. 2033 (Pa. Super. Ct. July 27, 1994) 6a. The Supreme Court of Pennsylvania, Western District entered an order granting Petition for Allowance of Appeal on March 6, 1995. *Charney v. Panitz*, No. 459 W.D. Allocatur Docket, 1994 (Pa. March 6, 1995), 2a. After argument, the Supreme Court of Pennsylvania, Western District issued a final order on January 18, 1996 dismissing the appeal as having been improvidently granted. *Charney v. Panitz*, No. 17 W.D. Appeal Docket 1995 (Pa. January 18, 1996), 1a.

JURISDICTION

The Supreme Court of Pennsylvania entered an order declining its exercise of jurisdiction in this matter on January 18, 1996, 1a. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

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[1]The opinions and orders are reprinted in the Appendix to this Petition For A Writ of Certiorari. Citations to this Appendix are made to the page number therein as ____a.

STATEMENT OF THE CASE

Virtually all civil litigation in our country requires the hiring of experts for their opinion testimony to prove or to disprove some central issue, critical to or determinative of the case.

Our case raises substantial constitutional questions that are nascent throughout the Unites States in thousands of law suits each year. Our case shows how a litigant can be harmed by his own expert's deception and be effectively denied meaningful access to a due process trial.

Your petitioners, the Charney family members (hereinafter the Charneys), were injured by formaldehyde gas released by the construction products from a newly built home purchased and lived in by them. They hired Elaine B. Panitz, M.D. (hereinafter Panitz) to testify as an expert in a law suit for permanent and debilitating injury caused by inhalation of formaldehyde.

The key defense to a formaldehyde exposure case is that cigarette smokers are exposed to formaldehyde contained in cigarettes, but do not suffer from the ailments that are caused by formaldehyde exposure.

Dr. Panitz represented that she would testify that people who smoked cigarettes were sometimes sensitized to formaldehyde, but were not always aware of it; that sometimes the people who are sensitized from smoking are able to suppress their symptoms; and, that cigarette smoke as it enters the mouth and lips is diluted by the inhalation of air and the use of protective filters.

Panitz, to convince the Charneys to hire her, showed the Charneys her testimony in a previous law suit, known as the Alaskan "Crown Point Litigation". She displayed testimony that she could respond convincingly to cross examination and support her opinion about the critical issue of formaldehyde in tobacco smoke and why it did not cause formaldehyde sensitivity to tobacco smokers.

Dr. Panitz was hired; she assisted in the preparation for the trial, performed medical examinations of the Charneys, authored an expert report and was paid $9,245.00 by the Charneys for her services and billed the Charneys an additional $5,100.00.

At sometime after she was hired, Panitz revised her opinion about the "cigarette smoking". Dr. Panitz decided that she no longer had an opinion why cigarette smokers did not suffer from formaldehyde exposure as a result of smoking.

Throughout the pre-trial preparation, Dr. Panitz did not inform the Charneys or their legal counsel of her new opinion. Therefore, based upon their understanding of the strength of the causal relationship between their injuries and the formaldehyde exposure and Dr. Panitz's ability to handle the "smoking" issue, the Charneys did not accept settlement offers.

At the trial, the issue of the relationship between cigarette smoking and formaldehyde was raised by the defense counsel, and much to the surprise of the Charneys and their legal counsel, Dr. Panitz answered that she did not know why cigarette smokers do not suffer from formaldehyde exposure.

A defense verdict came in after a short summation by defense counsel. The closing argument pointed out that cigarette smokers, who have more exposure to formaldehyde than the Charneys, do not suffer from the formaldehyde exposure, and that the Charneys offered no evidence to explain this. Counsel for the defense argued: since cigarette smokers are not harmed by formaldehyde, neither were the Charneys, and therefore, the Charneys were not able to establish that their injuries came from exposure to formaldehyde.

After Dr. Panitz left the witness stand, she told the Charneys' counsel that she had reached different conclusions, before trial, regarding key issues of formaldehyde and tobacco smoke. When the Charneys and their legal counsel asked her why she had not notified them of her changed opinion, she could not explain why she had not notified the Charneys or their counsel of her true opinions on this subject prior to trial.

The Charneys filed suit alleging a cause of action in tort for professional negligence against a professional who agreed to provide litigation-related services for compensation, as well as to testify at trial by providing expert testimony that was truthful, accurate and consistent with her previously expressed opinions.

The Amended Complaint set forth counts for Breach of Contract, Negligence, Negligent Misrepresentation, and Gross Negligence. The Charneys asserted in their Amended Complaint that Dr. Panitz had been dishonest with them and their counsel, regarding her true expert opinions, in order to secure employment by the Charneys or had significantly changed her opinion regarding a key element of the case after being hired, but before giving testimony, and had kept such information to herself, which frustrated the Charneys' and their attorneys' ability to make informed decisions on the conduct of their case and trial, including evaluation of the case for settlement purposes.

Panitz filed preliminary objections. The preliminary objections were sustained by the trial court ordering that Panitz had absolute immunity for her acts before testifying and while testifying.

Appeal was taken to the Superior Court of Pennsylvania. The Charneys cited the Pennsylvania Constitution, Article I, Section 11 and asserted the United States Constitution, the Fifth, Seventh, and Fourteenth Amendments. The Charneys argued that other states did not grant absolute immunity to expert witnesses.

The Superior Court of Pennsylvania found no error and found the appeal to be frivolous and an award of counsel fees to Panitz was found warranted, to be determined in amount by the trial court on remand.

The Charneys petitioned for review to the Supreme Court of Pennsylvania. Allocatur was granted. The Court called for briefs and oral argument. The Charneys argued that the decision of the Superior Court to give absolute immunity to an expert witness was in conflict with the law of the State of Missouri, Murphy v. Mathews, infra and three other states and cited the Pennsylvania Constitution, Article I, Section 1 and the United States Constitution, Fourteenth Amendment. The Charneys argued that the amerce of counsel fees for Panitz was violative of the Pennsylvania Constitution and the United States Constitution because the opinion and order for counsel fees was entered without notice of consideration or an opportunity to be heard, and that they were entered capriciously by the Superior Court because the issue

of absolute immunity was one that had not yet been decided by the Supreme Court of Pennsylvania.

On January 18, 1996, the Supreme Court of Pennsylvania dismissed the appeal as having been improvidently granted.

If the Charneys had been permitted to go to trial, instead of being dismissed by preliminary objections, it would have been proven that Panitz was employed as an expert witness to support that the Charneys injuries had been caused by formaldehyde. However, Panitz testified that frequent exposure to gaseous formaldehyde caused sensitivity and debility with respect to much of daily living and work, and then was unable to answer when asked why cigarette smokers did not get sensitized even though cigarette smoking produced formaldehyde. She had previously told the Charneys that she had a good and scientific explanation to explain this apparently contradictory phenomena.

In the instant case, it would have been proven that Panitz had changed her opinion before trial and for some reason she did not inform the Charneys of the same. The claim was lost because of the deliberate and continuing misrepresentations of Panitz to the Charneys. No attempt was made to postpone the trial because the Charneys did not know of the danger Panitz had created, until after she testified. Offers to settle were turned aside, in reliance of the opinion given to the Charneys, to their harm.

REASONS FOR GRANTING THE WRIT

This case presents matters of grave importance to the thousand of litigants and their counsel involved in law suits throughout the United States. The court of last resort in Pennsylvania has declared the law to be that an expert hired to testify in court by a litigant has immunity from suit. The courts of last resort of Missouri, New Jersey, Texas, and California have declared the law to be that there is not to be absolute immunity. This conflict among courts of the various states should be settled by this court. The awarding of counsel fees is threatening to become endemic. Orderly guidelines should be established by this court. This case meets the standards for granting a writ of

certiorari set forth in Sup. Ct. R. 10.1(b) and 10.1(c).

I. ABSOLUTE IMMUNITY FOR EXPERT WITNESSES VIOLATES A CIVIL LITIGANT'S DUE PROCESS RIGHTS TO MEANINGFUL ACCESS TO COURT

A. Practical Importance of the issue.

The late Justice Thurgood Marshall observed, "We recognized long ago that mere access to the Courthouse doors does not by itself assure a proper functioning of the adversary process ..."

Ake v. Oklahoma, 470 U.S. 68, 77 (1985).

Virtually all civil litigation in our country requires the hiring of experts for their opinion testimony to prove or to disprove some central issue, critical to or determinative of the case.

Both client and lawyer have only minimal credentials to pick or supervise an expert to testify. It is largely a situation of trust. To grant immunity to a fraudulent and negligent expert can only encourage misrepresentation and carelessness in preparing and presenting expert opinion, contempt for the employing party and indifference to the court process.

The use of expert testimony has been employed at least since the time of the venerable Bracton. Different means of employing such testimony were in vogue over the many years since Bracton. Today the vogue is to call before the jury skilled persons as witnesses.

> No doubt, there are good historical reasons why this ... method has survived, but they by no means justify its continued existence, and it is, as I conceive, in fact an anomaly fertile of much practical inconvenience."

15 Harvard Law Revue 40, Historical and Practical Considerations Regarding Expert Testimony by Learned Hand

> A faulty analysis by a hired expert could lead an attorney to abandon a strong case or pursue a weak one, notes Edward Imwinkelried, an evidence expert at the University of California at Davis School of Law. "They can cause you to lose your case and waste horrendous amounts of money."

November J.A.B.A 77 (1994), Off-Target Opinions

> With expert witnesses being paid to testify on everything from alloys to zygotes, courts are increasingly willing to let clients sue their hired guns who misfire on the stand.

November J.A.B.A 76 (1994), Off-Target Opinions

A search of law review articles reveals that thought has been given to the problem of the expert witness, their ubiquitous employment and just how they can best mesh with our tested, tried and acclaimed adversarial system, which has been acclaimed the best devised. Law Review articles with believable uniformity convincingly set forth arguments urging that expert witnesses be made responsible for careless and callous work and that they be subject to the possibility of being held responsible for their negligence and misrepresentation. This should have the salutary effect of improving the quality of analysis and testimony.

> Potential liability also provides a form of quality control over expert services. Most litigants are incapable of assessing their experts' competence. Accordingly, the long-established contract principle of caveat emptor is inapplicable. If experts are exposed to liability for their litigation support services or forensic activities, they will necessarily strive to be more accurate and careful in their work. Of course, experts' heightened accuracy and care ultimately benefit their clients. Indeed, expert witnesses' enhanced

> professional services are rendered in connection with litigation, instead of in an office, on a construction site, or in a hospital should not deny the experts' clients basic protection. (Emphasis added)

Capital University Law Review 692, 707 (1993), The Emerging Theory of Expert Witness Malpractice.

> Given the special relationship that exists between the client and the expert, coupled with the expert's unique role in the judicial process, a ... realistic and just rule is warranted. (emphasis added).

26 Willamette Law Review 1051, 1081 Absolute Immunity for the Negligent Expert Witness: Bruce V. Byrne-Stevens

B. Conflict Among the States

Bruce v. Byrne-Stevens & Associates, Eng., 113 Wash. 2d 123, 776 P.2d 666 (1989) is the leading authority for absolute expert witness immunity. It is a plurality decision with one Justice concurring in the result only.

Contrary to Bruce is Murphy v. A.A. Mathews, 841 S.W.2d 671 (Mo.banc 1992). The holding there was that witness immunity is not to be extended to a professional who agreed to provide litigation related services for compensation, if there is professional negligence in providing the agreed services.

> Our decision is based primarily upon the commercial relationship assumed by the professional and his or her role as an advocate. Expert witnesses have taken on a growing role in modern litigation. Not only do they testify in more and more cases, but they also play a substantial role in case preparation. Often they play as great a role in the organization and shaping

> and evaluation of their client's case as do the lawyers. Those who provide these services are selected for their skill and ability and are compensated accordingly, just as any other professional. More often than not, their role is as an advisor and advocate as opposed to an objective and independent witness.
>
> We find no reason or principle of public policy justifying the extension of witness immunity to professionals retained for litigation support services.
>
> In short, Mathews was not an independent fact or opinion witness with information to be presented to the court in an objective manner. Mathews agreed to provide his expert services to American to assist it in the preparation of its claim.

Murphy v. A. A. Mathews, 841 S.W.2d 671 (Mo.banc 1992).

The three other jurisdictions that have found against granting expert immunity are: The Supreme Court of Texas, James v. Brown, 637 S.W.2d 914 (Texas 1982), the Supreme Court of New Jersey (Dr. Panitz' home state) in Levine v. Wiss & Co., 97 N.J. 242, 478 A.2d 397 (1984), and in a California appellate decision, Mattco Forge, Inc. v. Arthur Young & Co., 5 Cal.App. 4th 392, 6 Cal.Rptr.2d 781, (1992)

The Pennsylvania Court, in reaching its decision, did not consider the true role of an expert in litigation today. During preparation for trial the expert becomes an assistant advocate and is available for exposing technical weaknesses in the opponent's case and formulates questions and arguments for the client. The expert does not act at trial on the court's behalf, but can best help the court and the litigation process by serving and performing as an assistant advocate.

It is necessary that the expert be a shepherd and protect the client from the ravages of partisan testimony of the opposition

expert by alerting the party for whom the expert is working to possible asserted positions of testimony by the opposition expert and suggesting the fallacies of theory and misapplication of facts upon which a misconceived or misleading opinion can be asserted.

The expert cannot do his job properly without being an advocate. The fact that there is litigation with expert opinion presupposes that there is a conflict of opinion, probably varying by the facts proven. Facts upon which an opinion can be based are such that counsel has to be instructed how to present them so that they are clearly and completely presented with full explanation as to their importance. Similarly, facts that are misleading, obfuscate and give the false appearance of validity to an opinion, must be warned about and unveiled.

What vestige of the magic of the courtroom shall we cling to? Shall we perpetuate the myth of the expert not being an advocate? This only hides the truth from the jury and promotes a false ring to the trial. The advocacy of an expert in deference to the goal of fair trial should be disclosed. To do less is to continue, a charade and false facade that will cause contempt for the honesty of trials.

We need to look at what is the epistemology of the American Jury Trial System. Our system is to arrive at truth by the friction of competing ideas.

We should remember that expert opinion testimony has been considered to be at the bottom of the evidence valuation scale. Opinion testimony is not factual testimony, it only becomes factual when the jury has accepted and adopted it.

C. Constitutional significance.

The general problem of experts and their testimony has been dealt with by The Supreme Court of the United States concerned with the specific problem of indigent rights to expert assistance and expert witness testimony. Due process under the 5th and 14th Amendments requires that a litigant be permitted to be "heard" effectively through an expert where the matter in

controversy must be explained and opined upon by an expert. The expert is an indispensable element in many cases (and was in ours). Wernimont v. International Harvester Corp., 309 N.W.2d 137 (1981) (defectiveness); Makuc v. American Honda Motor Co., 835 F.2d 389 (lst Cir. 1987) (causation); Ross v. Moffit, 417 U.S. 600 (1974).

> "[A] defendant may be at an unfair disadvantage, if he is unable because of poverty to parry by his own [expert] witness the thrusts of those against him." -- Judge Cardozo

Reilly v. Berry, 250 N.Y. 456, 461, 166 N.E. 165, 167 (1929), quoted in Ake v. State, 470 U.S. 68 at 82 n 8 (1985).

Without some form of assistance a litigant is often unable to assert legitimate claims or defenses. some instances of eye catching value are:

> "... accounting in tax cases; analysis of glass, teeth and bite marks, and medical opinions in tort actions; handwriting, typewriter, and ink analysis in contract and will cases; genetic testing for paternity; psychiatric and psychological reports in family disputes; and technology based evidence such as neutron activation analysis, atomic absorption spectrometry, trace metal detection, and gas chromatography. The list seems endless. **The absence of such testimony could be dispositive in many cases.**" (Emphasis Added)

41 The Hastings Law Journal 281, 288 (1990), Expert Assistance in Civil Cases.

Shall we say and agree that expert testimony is big business and that only government business should have immunity? The job of the expert witness is so much larger than just the time spent in testifying.

> In a highly specialized area, counsel for an ... litigant, ... may have no idea where to look for evidence or how to deal with it when it is found.

> Expert witnesses can play a critical part in the preparation of a case. They can assist ... counsel in planning the presentation of the case, and in gathering and organizing the available evidence.

41 The Hastings Law Journal 281, 289 (1990), Expert Assistance in Civil Cases.

The Supreme Court of the United States has recognized the need to supply expert witness assistance and testimony in indigent cases. We have cases that recognize that there is a right, subject to certain requirements, as to whether an indigent shall be given paid for expert assistance in civil cases. In our case. the expert was privately provided. However, we cannot let due process stop with the appearance of an expert. An expert who is careless and deceptive in litigating and causes harm to his litigator is an abomination in the legal system. The question that should be asked is why permit the suit, if the litigant's best shot is destroyed by carelessness or fraud for which there is no recourse. The notion that truth and honesty of the expert will be made more likely by granting immunity than requiring responsibility is a surmise. It is a certainty that the quality of expert assistance and expert testimony will not be improved by removing responsibility. Can we not decide that good workmanship, a thorough work-up of a problem, good craftsmanship begets honesty? Is it not true, that deliberate misstatements are made when the perpetrator is attempting to conceal shoddy work?

Honesty and candor require an immediate disclosure of change of opinion. Giving immunity and taking away responsibility offers the potential for carelessness and abuse. The requirement to answer, as a responsible professional with financial consequences, could have averted injustice and can avert it in the future. The potential arrogance that follows immunity can only work for the diminution of and disregard for our courts.

II. THE SUPERIOR COURT OF PENNSYLVANIA VIOLATED THE FIFTH AND FOURTEENTH AMENDMENTS BY ASSESSING A PARTY COUNSEL FEES FOR APPEALING A CASE TO THE SUPERIOR COURT WHEN THE CONTROLLING AND DECIDING ISSUE IS AN ISSUE OF FIRST IMPRESSION

A. The Award of Counsel Fees.

The Pennsylvania Superior Court's decision assessing counsel fees in this case gives rise to substantial constitutional questions with grave importance to the thousands of litigants and their counsel involved law suits in this country.

The effect of the Pennsylvania Superior Court's decision would be the preclusion of many appeals that have merit and that might challenge an adverse ruling by the Superior Court, even in those cases where there may be significant cause to question whether the Superior Court was acting constitutionally or had misstated the law of the Commonwealth of Pennsylvania for fear of sanction by that Court.

The opinion and order of The Superior Court of Pennsylvania awarding counsel fees was made without fair and adequate prior notice of consideration.

The order for counsel fees was entered capriciously as the issue of absolute immunity for an expert witness had not been decided by the Supreme Court of Pennsylvania.

The order for counsel fees (amerce) is in violation of the fifth and fourteenth amendments to the Constitution of the United States. It is contrary to Roadway Express v. Piper, 447 U.S. 752 (1980).

The amerce of the Superior Court of Pennsylvania is an appropriate example of a "chilling effect" contrary to due process.

> Despite the tensions of the job, trial judges must have the patience and the resolve to tolerate

> advocates who are not gracious losers and who argue propositions on the marginal edge of evolving doctrines. For history teaches us that in the evolution of the law, legal propositions that were almost heresy one day often at a later time become the law of the land.

Ford v. Temple Hosp., 790 F. 2d 342, 349 n. 11 (3d Cir. 1986), quoting Baker Indus. v. Cerberus, Ltd., 764 F. 2d 204, 224 (3d Cir. 1985) (Higginbotham, J., dissenting).

CONCLUSION

For all of the aforesaid reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: April 17, 1996

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Petitioners,

--v.--

ELAINE B. PANITZ,

Respondents.

Petition For a Writ of Certiorari To The Superior Court of Pennsylvania

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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J-130-1995
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

	: No. 17 W.D. Appeal Docket 1995
JOHN CHARNEY and ALICE CHARNEY, his wife, and JOHN CHARNEY, JR., their son, and JOHN CHARNEY as parent and natural guardian of BRIAN CHARNEY, a minor, Appellants,	: Appeal from the Order of the Superior Court at No. 2033 Pittsburgh, 1993, entered July 27, 1994, affirming the Order of the Court of Common Pleas of Westmoreland County, Civil Division at No. 877 of 1993, entered November 22, 1993.
v.	:
ELAINE B. PANITZ, Appellee.	:
	: ARGUED: September 19, 1995

ORDER

PER CURIAM **DECIDED: January 18, 1996**

The appeal is dismissed as having been improvidently granted.

Mr. Justice Montemuro, who was sitting by designation, did not participate in the decision of this case.

JUDGEMENT ENTERED THIS 18TH DAY OF JANUARY 1996

/s/ Amy J. Ceraso
DEPUTY PROTHONOTARY

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

JOHN CHARNEY AND ALICE CHARNEY, HIS WIFE, AND JOHN CHARNEY, JR., THEIR SON, AND JOHN CHARNEY, AS PARENT AND NATURAL GUARDIAN OF BRIAN CHARNEY, A MINOR, Petitioners,	:	No. 459 W.D. Allocatur Dkt. 1994
v.	:	
ELAINE B. PANITZ, Respondent.	:	Petition for Allowance of Appeal from the order of the Superior Court

ORDER

PER CURIAM:

AND NOW this 6th day of March, 1995, the Petition for Allowance of Appeal is GRANTED. Petitioners' Petition for Consolidation with the Petition for Allowance of Appeal at No. 647 W.D. Allocatur Docket 1993 is DENIED as moot.

Mr. Justice Montemuro is sitting by designation.

A True Copy Irma T. Gardner
as of: March 6, 1995
Test: /s/ Irma T. Gardner
Deputy Prothonotary
Supreme Court of Pennsylvania

J. A24047/94 - 1

JOHN CHARNEY AND ALICE CHARNEY, HIS WIFE, AND JOHN CHARNEY, JR., THEIR SON AND JOHN CHARNEY AS THE PARENT AND NATURAL GUARDIAN OF BRIAN CHARNEY, A MINOR, APPELLANT	:	IN THE SUPERIOR COURT PENNSYLVANIA
V.	:	
ELAINE B. PANITZ, APPELLEE	:	NO. 02033 PITTSBURGH 1993

Appeal from the Order Entered November 22, 1993, In the Court of Common Pleas of Westmoreland County, CIVIL, No. 877 of 1993 Term.

BEFORE: BECK, HUDOCK, and CERCONE, JJ.

MEMORANDUM: Date: July 27, 1994

This is an appeal from an order sustaining appellee Dr. Elaine Panitz's preliminary objections and dismissing appellants' complaint. For the reasons stated herein, we affirm the order of the trial court and remand for the trial court to assess attorney's fees.

The factual and procedural history is summarized as follows. The Charney family (appellants) initiated an action against Crawford Construction Company alleging that they had sustained injuries as a result of being exposed to formaldehyde present in building materials. Appellee Panitz was employed as an expert witness to support appellants' personal injury action. Panitz testified at trial that in her opinion appellants' injuries had been caused by the formaldehyde. However, when Panitz was cross-

examined about the lack of sensitization of cigarette smokers who are regularly exposed to formaldehyde, she failed to explain the inconsistency in her testimony. Panitz later informed appellants that prior to trial she had realized that her conclusions regarding the formaldehyde sensitization of cigarette smokers was inaccurate.

A verdict unfavorable to appellant was returned in the underlying action. Appellant then filed a complaint against Panitz alleging breach of contract, negligence, negligent misrepresentation, and gross negligence. Panitz filed preliminary objections to appellants' complaint. The trial court sustained the preliminary objections and dismissed the entire complaint. This appeal followed.

On appeal, appellants contend that the trial court erred in extending the absolute testimonial privilege to Panitz's pre-trial representations. The argument raised in the instant appeal is the precise argument raised and rejected by this court in Panitz v. Behrend, 632 A.2d 562 (Pa. Super. 1993). To the extent appellants ask us to revisit this issue, we note that absent reversal by the Supreme Court our decision in Behrend is controlling authority. Commonwealth v. Leib, 588 A.2d 922, 932 (Pa. Super. 1991). Accordingly, we find no error.

As a separate and additional matter, Panitz contends that appellants' appeal is frivolous and requests an award of counsel fees pursuant to Pa.R.A.P. 2744. An appeal is considered frivolous when the realistic chances of ultimate success are slight and continuation of the contest is unreasonable. Murphy v. Murphy, 699 A.2d 647 (Pa. Super. 1991). See also Jackson v. Modern

Mailers, Inc., 537 A.2d 878 (Pa. Super. 1988). Under the circumstances of this case, an award of counsel fees to Panitz under Pa.R.A.P. 2744 is warranted. Hence, on this issue alone, we remand to the trial court to assess the amount of counsel fees.

The trial court's order is affirmed. The matter is remanded for an assessment of counsel fees. Jurisdiction is relinquished.

SUPERIOR COURT OF PENNSYLVANIA
PITTSBURGH DISTRICT

JOHN CHARNEY AND ALICE CHARNEY HIS WIFE, AND JOHN CHARNEY, JR., THEIR SON AND JOHN CHARNEY AS THE PARENT AND NATURAL GUARDIAN OF BRIAN CHARNEY, A MINOR, APPELLANT	:
VS.	:
ELAINE B. PANITZ, APPELLEE	: NO. 2033 PITTSBURGH 1993

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Westmoreland County be, and the same is hereby affirmed. The matter is remanded for an assessment of counsel fees. Jurisdiction is relinquished.

BY THE COURT:

/s/ Eleanor R. Valecko
DEPUTY PROTHONOTARY

DATED: JULY 27, 1994

IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY, PENNSYLVANIA

CIVIL DIVISION

JOHN CHARNEY and ALICE CHARNEY, his wife, and JOHN CHARNEY, JR., their son, and JOHN CHARNEY, as the parent and natural guardian of BRIAN CHARNEY, minor, Plaintiffs	)	
vs.	)	Court en Banc No. 877 of 1993
ELAINE B. PANITZ, Defendant	)	

OPINION

This matter comes before the Court upon the Preliminary Objections of the Defendant Elaine B. Panitz.

The Plaintiffs have filed an Amended Complaint alleging that the Defendant fraudulently and negligently provided expert testimony for them in a case in which they were plaintiffs. The Plaintiffs alleged that the Defendant promised to provide specific testimony for them at the trial of Charney v. Crawford Construction Co., No. 5306 of 1984 (Westmoreland). The Defendant provided expert testimony at trial and the Plaintiff allege that she failed to answer questions on cross examination as she had represented she would answer. The Plaintiff seeks damages in the amount that they allege they would have recovered in Charney v. Crawford Construction Co. if the Defendant's testimony would have been given as represented.

The Defendant argues that the Plaintiffs have no cause of action against her. She requests that the cause of action against her be dismissed based upon the absolute privilege protecting testimony at trial.

As a result of the trial Charney v. Crawford Construction Co., the Defendant filed suit in Allegheny County seeking the payment of her expert witness fees. A counterclaim was filed against the Defendant alleging the same cause of action as set forth in the above-captioned case. The counterclaim was dismissed by Judge Wettick based upon the absolute privilege relating to testimony at trial. Panitz v. Behrend, 141 P.L.J. 203 (1993). See also Post v. Mendel, 510 Pa. 213, 507 A.2d 351 (1986); Clodgo v Bowman, 411 Pa. Super. 267, 601 A.2d 342 (1992).

The decision of Judge Wettick was affirmed by the Superior Court. Panitz v. Behrend, No. 399 of 1993 (Pa. Super. 1993). The Superior Court specifically noted that the privilege protects testimony given at trial and further extends to pre-trial communications. Panitz, No. 399 of 1993 at 5. See also Moses v. v. McWilliams, 379 Pa. Super. 150, 549 A.2d 950 (1988).

The Superior Court addressed the issue before this Court in Panitz. In addition, this Court is bound by the case law preceding Panitz governing the issues of privilege as to communications in judicial proceedings. The Plaintiffs' Complaint fails to state a cause of action.

The Court will enter the following Order:

IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION

JOHN CHARNEY and ALICE CHARNEY, his wife, and JOHN CHARNEY, JR., their son, and JOHN CHARNEY, as the parent and natural guardian of BRIAN CHARNEY, minor, Plaintiffs	)	
	)	Court en Banc
vs.	)	No. 877 of 1993
ELAINE B. PANITZ, Defendant	)	

ORDER OF COURT

AND NOW, to wit, this 22nd day of November, 1993, the Preliminary Objections of the Defendant Elaine P. Panitz to the Plaintiffs' Amended Complaint are granted. The Amended Complaint against the Defendant is dismissed.

BY THE COURT:

/s/
Bernard F. Scherer, Judge

ATTEST:

Prothonotary

IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY, PENNSYLVANIA

JOHN CHARNEY and ALICE CHARNEY, his wife, and JOHN CHARNEY, JR., their son, and JOHN CHARNEY, as the parent and natural guardian of BRIAN CHARNEY, a minor,

Plaintiffs,

v.

ELAINE B. PANITZ,

Defendant.

CIVIL DIVISION

NO. 877 OF TERM, 1993

CODE:

AMENDED COMPLAINT IN CIVIL ACTION

Filed on behalf of John Charney, Alice Charney, John Charney, Jr., and Brian Charney, Plaintiffs

Counsel of Record for these parties:

Kenneth W. Behrend
PA. I.D. No. 00406
BEHREND AND ERNSBERGER

Firm No. 018
2400 Grant Building
Pittsburgh, PA 15219

(412) 391-2515

JURY TRIAL DEMANDED

IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY, PENNSYLVANIA

CIVIL DIVISION

NOTICE TO DEFEND AND CLAIM RIGHTS

TO THE ABOVE DEFENDANT(S):

You have been sued in Court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the Court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so, the case may proceed without you and a judgment may be entered against you by the Court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff or defendant. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

WESTMORELAND BAR ASSOCIATION
129 NORTH PENNSYLVANIA AVENUE
GREENSBURG, PA 15601

(412) 834-8490

JOHN CHARNEY and ALICE CHARNEY, his wife, and JOHN CHARNEY, JR., their son and JOHN CHARNEY, as parent and natural guardian of BRIAN CHARNEY, a minor,	: COURT OF COMMON PLEAS :WESTMORELAND COUNTY : : CIVIL ACTION - LAW : : NO. 877 OF TERM, 1993
Plaintiffs,	:
v.	:
ELAINE B. PANITZ,	:
Defendant.	:

AMENDED COMPLAINT

AND NOW, comes the Plaintiffs, John Charney and Alice Charney, his wife, and John Charney Jr., their son, and John Charney as the parent and natural guardian of Brian Charney, a minor, by and through their attorney, Kenneth W. Behrend, and the law firm of Behrend and Ernsberger, and file the within Amended Complaint and in support thereof avers the following:

FACTUAL BACKGROUND

1. The Plaintiffs John Charney, his wife Alice Charney and their sons John Charney Jr. and Brian Charney are individuals who reside in Westmoreland County, Pennsylvania at 10 Carlisle Drive, R.D. #1, Irwin, Pennsylvania.

2. Defendant Elaine B. Panitz, M.D., is an expert medical witness who offers her professional services of providing expert medical opinions for use in civil litigation throughout Pennsylvania and in Westmoreland County and who resides in Princeton, New Jersey.

3. Plaintiffs had initiated a suit in Westmoreland County, Charney v. Crawford Construction Company, claiming injuries as a result of formaldehyde poisoning from outgassing materials used in the construction of their home. Formaldehyde sensitization was a rare area of litigation at that time and the Plaintiffs needed an expert that had a sound knowledge of the subject and familiarity with the medical literature.

4. In March, 1990, the Defendant agreed to review medical records, conduct a physical examination of each Plaintiff and provide an expert medical opinion regarding the Plaintiffs' claim of formaldehyde poisoning. On March 30, 1990, the Defendant was sent records of the Plaintiffs' medical treatment and history along with a letter from Plaintiffs' counsel requesting this Defendant's expert medical opinion as to whether or not the Plaintiffs had suffered formaldehyde injuries, and if they had, the extent of their sensitivity to formaldehyde and any other chemicals and how this might affect their ability to work. Additional medical records were sent to the Defendant for her review on April 6, 1990 and on April 10, 1990.

5. On April 13, 1990, the Defendant sent a letter by fax to the Plaintiffs' attorney agreeing to examine the Plaintiffs on April 18, 1990, with a retainer of $3,900 to be paid in advance.

6. On April 17, 1990, the Defendant sent to the Plaintiffs' legal counsel six (6) volumes of this Defendant's deposition testimony from an earlier lawsuit, the Alaskan "Crown Point Litigation", which involved a formaldehyde spill and exposure. This was presented to the Plaintiffs as the Defendant's expert medical opinion on formaldehyde sensitization and represented the extent and nature of the testimony she would give in the Plaintiffs' case on various formaldehyde sensitization issues.

7. A serious issue in the area of formaldehyde sensitization is that of tobacco smokers and their alleged exposure to high levels of formaldehyde and apparent lack of formaldehyde sensitization reactions. This was important not only from the standpoint that one of the Plaintiffs had been a smoker once, but because it challenged the assertion that it was even possible for people to become sensitized to formaldehyde. Defendant Panitz

opined that exposure to .1 to .2 parts per million (ppm) of formaldehyde was sufficient to cause sensitization in people; however, tobacco smoke can contain as much as 40 ppm of formaldehyde, and yet most smokers show no signs of formaldehyde sensitization. Failure to satisfactorily explain this paradox would undermine the Plaintiffs' entire case.

8. The Defendant's opinion was clear from the "Crown Point Litigation" depositions that:

a. people can become sensitized and still smoke;
b. forty parts per million (40ppm) of formaldehyde in the smoke does not necessarily translate to the same number in the lungs;
c. it is possible that smokers do react and are simply denying the sensitization reaction; and
d. the sensitization reaction might be masked by the regular irritative symptoms caused by the cigarette smoke.

9. On April 18, 1990, Defendant traveled to Pittsburgh to perform a history and physical examination of the Plaintiffs. She prepared and delivered to the Plaintiffs an expert report based on the physical examinations performed in Pennsylvania. The Plaintiffs, John and Alice Charney, paid the Defendant $3,900.00 for this work by personal check.

10. On May 14, 1990, the Defendant provided her report to the Plaintiff's based on her examination of the Plaintiffs and a review of their history and medical records. Her charge for the report was $245.00 and was paid by the Plaintiffs. There was no indication in the reports nor at any time did the Defendant notify the Plaintiffs or their counsel any intention to give testimony contrary to her opinions clearly stated in the "Crown Point Litigation" depositions.

11. The Defendant continued to correspond with the Plaintiffs and their counsel and expressed her willingness to offer her expert opinions into testimony at trial. A letter from the Defendant on January 7, 1991 conveyed her agreement to do so for a retainer of $5,100.00.

12. The Defendant in this action is a medical doctor who

derives 90% of her income by giving testimony as an expert witness. She is a New Jersey resident and was referred to the defendants by a medical doctor in California. She was selected as an expert witness in the case of Charney vs. Crawford Construction Co. in Greensburg, Pennsylvania, because she asserted she was knowledgeable about the effects of formaldehyde gas on individuals, and because she had performed similar expert witness services for attorneys in Alaska and Florida. She was indicated she could respond convincingly to cross examination and support what she said with medical evidence.

13. The Plaintiffs reasonably expected that Defendant Elaine Panitz would be able to respond to cross examination about formaldehyde in tobacco smoke and that she would have medical proof for what she had to say.

14. At no time did the Defendant indicate to the Plaintiffs or their attorneys that she would change her testimony on formaldehyde in tobacco smoke from what it had been when she had testified in the "Crown Point Litigation".

15. The Defendant testified at trial beginning February 7, 1991, and at that time the issue of formaldehyde in tobacco smoke was raised by defense counsel. The Defendant Elaine Panitz then changed her testimony from what she had testified to in the Alaskan "Crown Point Litigation" and instead supported the assertion that 40 parts per million of formaldehyde in tobacco smoke translates to a like amount in the lungs, and that a pack-a-day smoker inhales 1,430 parts per million total aldehydes, most of which is formaldehyde, in the course of a single day.

16. The Defendant further testified that any sensitized individual generally has great difficulty with being in the presence of smoke, but then offered no testimony to explain why a smoker who appears to be exposed to high levels of formaldehyde does not seem to exhibit symptoms of being sensitized to formaldehyde.

17. The Defendant Elaine Panitz, completely contrary to the testimony she indicated to the Plaintiffs she would give and contrary to the testimony she had given in earlier cases, then fell silent and failed to offer any of the four explanations for the apparent lack of smoker sensitization that she gave in the "Crown

Point Litigation" depositions. She failed to say that people can become sensitized and still smoke; that forty parts per million formaldehyde in the smoke does not necessarily translate to the same number in the lungs; that it is possible that smokers do react and they are simply denying the sensitization reaction; and that the sensitization reaction might be masked by the regular irritative symptoms caused by cigarette smoke. She fully supported the figures on formaldehyde inhalation offered by the defense counsel although she had told the Plaintiffs that her testimony regarding such figures would be entirely different; nor had she ever expressed to the Plaintiffs her intention to testify to something radically different, especially on such a pivotal part of her testimony.

18. The Defendant Elaine Panitz further testified that this was the first time she ever testified in court on the subject of formaldehyde sensitization, but failed to explain that she had given sworn testimony in other cases by deposition, leaving the clear impression that she was inexperienced in this field.

19. After the Defendant Elaine Panitz left the witness stand, she told the Plaintiffs' counsel that she could not explain why tobacco smokers did not experience sensitization reaction, that the medical literature was silent on the subject, and also that she now thought that the full 40 parts per million of formaldehyde in tobacco smoke could be absorbed by the body not only through the lungs, but also through the nasal passages and eventually work its way into the bloodstream. She did not and could not explain why she had expressed to the Plaintiffs and their counsel that her testimony would be one thing, when in fact, it was entirely different.

20. This failure to explain why tobacco smokers did not experience sensitization reactions destroyed her credibility and struck a mortal blow to the very heart of the Plaintiff's case as defense counsel was able to argue in a very short closing statement that people do not become sensitized to formaldehyde at all. Sensitization is not seen even among those who experience high levels of formaldehyde exposure, such as those who smoke tobacco.

21. Defendant Elaine Panitz misled the Plaintiffs and their

counsel when she delivered the Crown Point Deposition transcript and indicated that she was prepared to testify on their behalf in support of the opinions she had given before.

22. The Defendant willfully, wantonly, and/or negligently and with reckless disregard of the consequences deceived the Plaintiffs when she represented to them her expert medical opinion on a critical matter in the Plaintiffs' case, and her willingness to testify consistent with that opinion, when in fact, her testimony on the issue was entirely different and was instead detrimental to the case.

23. The Defendant willfully, wantonly, deceitfully and/or negligently and with reckless disregard of the consequences induced the Plaintiff to contract for her services knowing that the Plaintiffs would expect her to give testimony consistent with Defendant's prior testimony in earlier litigation, or that the Defendant would advise the Plaintiffs or their counsel if the Defendant's expert medical opinion had changed since that time.

24. Defendant's failure to notify the Plaintiffs before trial that her testimony at trial would be different that what she had represented to the Plaintiffs --that her expert opinion was consistent with her testimony in the "Crown Point Litigation"-- was a breach of contract and a fraud upon the Plaintiffs.

COUNT I
BREACH OF CONTRACT

25. Plaintiff incorporates Paragraphs 1 through 24 as if the same were set forth herein at length.

26. Defendant represented herself to the Plaintiffs John and Alice Charney to be a medical expert competent to give expert medical testimony concerning formaldehyde poisoning and experienced.

27. Defendant represented to the Plaintiffs and their counsel that she had certain and definite expert medical opinions regarding formaldehyde sensitization and that those opinions were, in fact, the same opinions she set forth under oath in a deposition she gave as part of an Alaskan lawsuit known as "Crown Point Litigation"; the relevant portion of such deposition is attached and

marked exhibit A.

28. Defendant agreed to have medical proof for the testimony she was expected to give.

29. In reliance on the Defendant's representations, the Plaintiffs entered into a contract with the Defendant whereby the Defendant, in consideration for $3,900.00 from the Plaintiffs, agreed to conduct a medical examination of the Plaintiffs and prepare an expert report. Defendant was to provide the Plaintiffs her honest evaluation of their case, from a medical and scientific standpoint, and advise the Plaintiffs if her expert medical opinions were supportive of their case or if the Plaintiffs' case had medical or scientific flaws. Further, the Defendant agreed to testify on the Plaintiff's behalf at the Plaintiffs' trial in consideration for an additional fee including a, $5,100.00 pre-trial retainer.

30. Plaintiffs paid the Defendant $3,900. 00 by personal check for her services in examining the Plaintiffs and preparing an expert report. The Defendant also was paid $5,100.00 to cover her estimate of the time required for testimony and travel expenses.

31. At trial, the Defendant changed her testimony from what she had previously testified to under oath according to the deposition she presented to Plaintiffs and she failed to have medical proof to support her testimony.

32. Plaintiffs reasonably relied on the Defendant to give testimony as she had in her deposition and reasonably relied on Defendant to have medical proof for her expected testimony.

33. Defendant's testimony was crucial to the Plaintiff's case and the Plaintiffs and their counsel relied upon the Defendant's representations in evaluating their case, making a judgment of the chances of a successful outcome verses an early settlement, or whether to go forward with the litigation and the expenses it would incur.

34. Plaintiffs reasonably relied on the Defendant to advise them or their counsel if she intended to change her expert medical testimony on issues being litigated in the Plaintiffs' suit from the expert medical opinion the Defendant represented as her own and as evidenced in the deposition from the "Crown Point Litigation".

35. As a direct and legal result of Defendant's failure to give testimony according to her previous deposition and the representations made to the Plaintiffs and their counsel, and of her failure to have medical proof to support those opinions, and of her failure to notify the Plaintiffs or their counsel of her intention to change or alter her testimony from what she had represented to the Plaintiffs and their counsel, the Plaintiffs have suffered the following injuries and damages:

a. The Defendant Elaine Panitz was a substantial contributing factor in the subsequent loss of the Plaintiffs' formaldehyde poisoning suit and the substantial award for damages it would have provided them to make them whole.

b. The Plaintiffs were deprived of the opportunity to make an informed evaluation of their case and therefore was led to litigate the case, based on false information supplied by the Defendant Panitz and her failure to provide an honest evaluation of the case prior to trial, rather than consider a settlement out of court.

c. Plaintiffs have paid Defendant $9,000.00 and have been billed by the Defendant for an additional $5,330.26 for services which all came to no avail as a result of Defendant's breach of contract.

d. Plaintiffs have incurred substantial legal fees and expenses in reliance on Defendant's agreement to testify according to her representations. Much of these fees and expenses could have been avoided if the Defendant had advised the Plaintiffs of her change of opinion prior to trial.

WHEREFORE, Plaintiffs demand judgment against the Defendant in an amount in excess of $30,000 and any other relief that the court deems necessary or proper.

COUNT II
NEGLIGENCE

36. Paragraphs 1 through 35 are incorporated herein as if

the same were set forth at length.

37. Defendant had a duty to express her opinions with a reasonable degree of medical and/or scientific certainty.

38. Defendant had a duty to accurately express and communicate her opinion and her qualifications prior to trial so that the Plaintiffs would know that Defendant was ready to testify at trial.

39. Defendant had a duty to prepare for trial and be ready with medical and/or scientific support for the opinions she was to express at trial.

40. Defendant had a duty to accurately express her knowledge, skills and qualifications at trial and to be prepared to adequately defend herself under cross-examination at trial.

41. Defendant had a duty to inform Plaintiffs, prior to trial, when she finds that she is unable to express her opinions with a reasonable degree of medical and/or scientific certainty or if she had any intention to change or alter her testimony from what she had represented to the Plaintiffs or their counsel.

42. Defendant had a duty to inform the Plaintiffs, prior to trial, when she found that she no longer has the confidence in her opinions that she had earlier stated or implied.

43. Defendant negligently failed to:

a. express her opinions with a reasonable degree of medical and/or scientific certainty.

b. accurately express and communicate her opinion and her qualifications prior to trial so that Plaintiffs would know that Defendant was ready to testify at trial.

c. prepare for trial and be ready with medical and/or scientific support for the opinions she was to express at trial.

d. inform Plaintiffs, prior to trial, when she finds that she is unable to express her opinions with a reasonable degree of medical and/or scientific certainty.

e. inform the Plaintiffs, prior to trial, when she found that she no longer has the confidence in her

opinions that she had earlier stated or implied or if she had any intention to change or alter her testimony for whatever reason from what she had represented to the Plaintiffs to be her honest and truthful testimony.

44. Plaintiffs reasonably relied on the Defendant to give testimony as she had in her deposition and reasonably relied on Defendant to have medical proof for her expected testimony.

45. Defendant's testimony was crucial to the Plaintiffs' case and the Plaintiffs and their counsel relied upon the Defendant's representations in evaluating their case, making a judgment of the chances of a successful outcome verses an early settlement, or whether to go forward with the litigation and the expenses it would incur.

46. Plaintiffs reasonably relied on the Defendant to advise them or their counsel if she intended to change her expert medical testimony on issues being litigated in the Plaintiffs' suit from the expert medical opinion the Defendant represented as her own and as evidenced in the deposition from the "Crown Point Litigation".

47. As a direct and legal result of Defendant's failure to give testimony according to her previous deposition and the representations made to the Plaintiffs and their counsel, and of her failure to have medical proof to support those opinions, and of her failure to notify the Plaintiffs or their counsel of her intention to change or alter her testimony from what she had represented to the Plaintiffs and their counsel, the Plaintiffs have suffered the following injuries and damages:

a. The Defendant Elaine Panitz was a substantial contributing factor in the subsequent loss of the Plaintiffs' formaldehyde poisoning suit and the substantial award for damages it would have provided them to make them whole.

b. The Plaintiffs were deprived of the opportunity to make an informed evaluation of their case and therefore was led to litigate the case, based on false information supplied by the Defendant Panitz and her failure to provide an honest evaluation of the case prior to trial, rather than consider a

settlement out of court.

c. Plaintiffs have paid Defendant $9,000.00 and have been billed by the Defendant for an additional $5,330.26 for services which all came to no avail as a result of Defendant's breach of contract.

d. Plaintiffs have incurred substantial legal fees and expenses in reliance on Defendant's agreement to testify according to her representations. Much of these fees and expenses could have been avoided if the Defendant had advised the Plaintiffs of her change of opinion prior to trial.

WHEREFORE, the Plaintiffs demand judgment for compensatory against the Defendant in an amount in excess of $30,000.00 and any other such relief the court deems necessary or proper.

COUNT III

NEGLIGENT MISREPRESENTATION

(Restatement of Torts, Second, Section 552

48. Paragraphs I through 47 are incorporated herein as if the same were set forth at length.

49. Defendant in the course of her business, and profession and employment supplied false information for the guidance of the Plaintiffs in their business transactions.

50. Defendant represented to Plaintiffs that she was ready for trial.

51. Defendant represented that she was prepared to respond to questions regarding the sensitization of individuals to formaldehyde.

52. These representations were misrepresentations because she was not prepared to respond as she has stated or implied.

53. Defendant represented that she was prepared to explain why tobacco smokers who are exposed to formaldehyde in concentrations in excess of 40 ppm in tobacco smoke do not exhibit sensitization reactions.

54. Defendant represented that she was prepared to disagree with the proposition that 40 ppm formaldehyde in tobacco

smoke meant that 40 ppm was pulled into the lung; before trial she said in her Crown Point deposition:"I'm not sure that that means the individual is pulling in 40 parts per million formaldehyde into his lungs."

55. Defendant stated that she had read substantially all the medical literature on the subject and reasonably implied that she had some medical and/or scientific basis for her unwillingness to agree that 40 parts per million formaldehyde is pulled into the lungs.

56. This representation was a misrepresentation because she was not prepared to disagree, and at trial did not contest the assertion that tobacco smokers inhale 40 parts per million formaldehyde into the lung.

57. Defendant represented that she was prepared to say that in her opinion: "It's possible that they [tobacco smokers] do react and they are suppressing the symptoms and don't wish to recognize that the cigarette smoke is bothering them, that's possible, but I otherwise can't explain it."

58. Again she implied that having read substantially all the literature on the subject of formaldehyde sensitization that there was some medical and/or scientific basis for her opinion that tobacco smokers do react and are suppressing their symptoms.

59. This representation was a misrepresentation because she had no medical and/or scientific basis for the opinion and after trial she said there was no medical literature on the subject.

60. Defendant negligently represented her ability to testify on medical issues. She knew that proceeding to trial without a proper basis for her opinions that she stated or implied would create an extreme risk of loss. She proceeded with reckless indifference to the consequences of her conduct.

61. When she learned that she had no medical facts to support the testimony she had offered to give regarding formaldehyde in tobacco smoke, she negligently, and recklessly, failed to tell the Plaintiffs that she was not prepared to testify as she had indicated.

62. Defendant intended that the Plaintiffs would be guided by the information and knew that the Plaintiffs would rely on the

information given in their preparation of the case for trial.

63. Plaintiffs justifiably relied on her to testify and to respond to cross examination as she represented that she would.

64. Defendant negligently supplied information for the guidance of Plaintiffs when she failed to exercise reasonable care or competence in obtaining or communicating the information.

65. Plaintiff a reasonably relied on the Defendant to give testimony as she had in her deposition and reasonably relied on Defendant to have medical proof for her expected testimony.

66. Defendant's testimony was crucial to the Plaintiff's case and the Plaintiffs and their counsel relied upon the Defendant's representations in evaluating their case, the chances of a successful outcome verses an early settlement, or whether to go forward with the litigation and the expenses it would incur.

67. Plaintiffs reasonably relied on the Defendant to advise them or their counsel if her expert medical testimony on issues being litigated in the Plaintiffs' suit changed or differed from the expert medical opinion the Defendant represented as her own, as evidenced in the deposition from the "Crown Point Litigation".

68. As a direct and legal result of Defendant's failure to give testimony according to her previous deposition and the representations made to the Plaintiffs and their counsel, and of her failure to have medical proof to support those opinions, and of her failure to notify the Plaintiffs or their counsel of her intention to change or alter her testimony from what she had represented to the Plaintiffs and their counsel, the Plaintiffs have suffered the following injuries and damages:

a. The Defendant Elaine Panitz was a substantial contributing factor in the subsequent loss of the Plaintiffs' formaldehyde poisoning suit and the substantial award for damages it would have provided them to make them whole.

b. The Plaintiffs were deprived of the opportunity to make an informed evaluation of their case and therefore was led to litigate the case, based on false information supplied by the Defendant Panitz and her failure to provide an honest evaluation of

the case prior to trial, rather than consider a settlement out of court.

c. Plaintiffs have paid Defendant $9,000.00 and have been billed by the Defendant for an additional $5,330.26 for services which all came to no avail as a result of Defendant's breach of contract.

d. Plaintiffs have incurred substantial legal fees and expenses in reliance on Defendant's agreement to testify according to her representations. Much of these fees and expenses could have been avoided if the Defendant had advised the Plaintiffs of her change of opinion prior to trial.

WHEREFORE, the Plaintiffs demand judgment for compensatory and punitive damages against the plaintiff in an amount in excess of $30,000.00 and any other such relief that the court deems necessary or proper.

COUNT IV

GROSS NEGLIGENCE

69. Paragraphs 1 through 68 are incorporated herein as if the same were set forth at length.

70. In the Crown Point Deposition Defendant stated that:

a. people can become sensitized and still smoke;

b. forty parts per million formaldehyde in the smoke does not necessarily translate to the same number in the lungs;

c. that it is possible that smokers do react and they are simply denying the sensitization reaction; and

d. the sensitization reaction might be masked by the regular irritative symptoms, due to cigarette smoke.

71. Prior to trial she found that there were no medical facts to support this testimony.

72. When she learned that she had no medical facts to support the testimony she had offered to give regarding formaldehyde in tobacco smoke, she negligently, and recklessly, failed to tell Plaintiffs that she was not prepared to testify as she had indicated or that she intended to give testimony that

substantially differed from the testimony she had represented to the Plaintiffs reflected her true expert opinion.

73. She knew that proceeding to trial without a proper basis for her opinions that she stated or implied would create an extreme risk of loss. She proceeded with reckless indifference to the consequences of her conduct.

74. Defendant acted with willful wanton and reckless disregard of the truth or falsity of the testimony she had offered to give at trial, and when she learned of her inability to give the required testimony she willfully wantonly and recklessly failed to advise the Plaintiffs and/or their counsel.

75. Defendant demanded and accepted a retainer check in the amount of $5,100.00 knowing that she could not present and defend the testimony she had represented that she would make at trial.

76. Plaintiffs reasonably relied on the Defendant to give testimony as she had in her deposition and reasonably relied on Defendant to have medical proof for her expected testimony.

77. Defendant's testimony was crucial to the Plaintiff's case and the Plaintiffs and their counsel relied upon the Defendant's representations in evaluating their case, the chances of a successful outcome verses an early settlement, or whether to go forward with the litigation and the expenses it would incur.

78. Plaintiffs reasonably relied on the Defendant to advise them or their counsel if her expert medical opinion on issues being litigated in the Plaintiffs' suit changed or differed from the expert medical opinion the Defendant represented as her own now, as in the deposition from the "Crown Point Litigation".

79. As a direct and legal result of Defendant's failure to give testimony according to her previous deposition and the representations made to the Plaintiffs and their counsel, and of her failure to have medical proof to support those opinions, and of her failure to notify the Plaintiffs or their counsel of her intention to change or alter her testimony from what she had represented to the Plaintiffs and their counsel, the Plaintiffs have suffered the following injuries and damages:

a. The Defendant Elaine Panitz was a substantial

contributing factor in the subsequent loss of the Plaintiffs' formaldehyde poisoning suit and the substantial award for damages it would have provided them to make them whole.

b. The Plaintiffs were deprived of the opportunity to make an informed evaluation of their case and therefore was led to litigate the case, based on false information supplied by the Defendant Panitz and her failure to provide an honest evaluation of the case prior to trial, rather than consider a settlement out of court.

c. Plaintiffs have paid Defendant $9,000.00 and have been billed by the Defendant for an additional $5,330.26 for services which all came to no avail as a result of Defendant's breach of contract.

d. Plaintiffs have incurred substantial legal fees and expenses in reliance on Defendant's agreement to testify according to her representations. Much of these fees and expenses could have been avoided if the Defendant had advised the Plaintiffs of her change of opinion prior to trial.

WHEREFORE, the Plaintiffs demand judgment for compensatory and punitive damages against the defendant in an amount in excess of $30,000.00 and any other such relief the court may deem necessary or proper.

Respectfully submitted,
BEHREND & ERNSBERGER

By/s/_____
Kenneth W. Behrend
Attorney for the Plaintiffs

1 198
2 SUPERIOR COURT OF THE STATE OF ALASKA
3 THIRD JUDICIAL DISTRICT
4
5
6) No. 3AN-86-5812 Civil
7 CROWN POINT LITIGATION)
8) VOLUME II
9
10
11 Computer-aided transcript of deposition
12 testimony of ELAINE B. PANITZ, M.D., taken
13 stenographically in the above entitled matter before
14 EDWIN SILVER, Certified Shorthand Reporter and Notary
15 Public of the State of New Jersey, at the offices of
16 SMITH, STRATTON, WISE, HEHER & BRENNAN,
ESQS., 600
17 College Road East, Princeton, NJ 08540, on Tuesday,
18 December 5, 1989, commencing at 8:40 a.m.
19
20
21
22
23 SILVER & RENZI REPORTING SERVICE
24 824 WEST STATE STREET, TRENTON, NJ 08618
25 (609) 989-9191 or (800) 792-8880 (NJ Only)
Silver & Renzi Reporting Service

sensitized tend to have symptoms when they encounter tobacco smoke, although some who are sensitized still manage to smoke.

Q My question was: A person says that smoking doesn't bother him, could he be sensitized to formaldehyde?

A My evaluation of these plaintiffs has been that some of the individuals who are sensitized are still smoking, and I think one or two of them told me that he is not aware of increased symptoms while smoking.

Q But he is still sensitized to formaldehyde?

A I believe so, yes.

Q Even though formaldehyde contains--cigarette smoke contains approximately 40 parts per million of formaldehyde?

A Correct.

Q Well, let's alter the body's immune response. Before the exposure he would react to 80 parts per million and after 60 parts per million, so it really doesn't come into play with tobacco smoke?

I have difficulty understanding how his immune response is altered if he can be exposed to

40 parts per million. It doesn't seem very sensitive.

A No, you can't--the 40 parts per million, it is my understanding that the 40 parts per million represents the formaldehyde generated in, say, a room where there is a cigarette being smoked. The data is from the surgeon general 1979 publication. I believe that's where I have read it.

I'm not sure that that means the individual is pulling in 40 parts per million formaldehyde into his lungs. I don't personally know what the concentration is when you're pulling it into their lungs.

Q Well, if there is 40 parts per million in the smoker in the room, he is exposed to it, either his skin or his eyes or his upper respiratory tract, correct?

A Correct.

Q I'm not limiting myself to the lungs. If an individual can have his skin and eyes and upper respiratory tract exposed to 40 parts per million with no problems, do you consider him sensitized?

A There are some of these individuals who had symptoms in relation to smoking, eye and

respiratory symptoms in relation to smoking, although it's not, in my opinion, possible to detect whether they were having regular irritative symptoms in that situation due to cigarette smoke.

I cannot explain why certain of the individuals who I believe are sensitized to formaldehyde do not react to cigarette smoke when they smoke. It's possible that they do react and they are suppressing the symptoms and don't wish to recognize that the cigarette smoke is bothering them, that's possible, but I otherwise can't explain it.

Q Basically, your diagnosis of sensitization is that an individual experiences more symptoms after exposure to a substance than he did before?

A Correct, and to lower levels.

Q That was my next question.

How do you know what the levels were before and after to which they are exposed that caused the symptoms?

A I'm sorry, could you clarify your question? I'm not sure what you're asking.

Q How do you know the lower--strike that.

How do you know that they are

CERTIFICATE OF SERVICE

I, Kenneth W. Behrend, hereby certify that a true and correct copy of the foregoing Amended Complaint in Civil Action was served upon all counsel of record by U.S. first-class mail, postage prepaid on this 2nd, day of August 1993, as follows:

Alan S. Gold, Esquire
MONAGHAN & GOLD
Manor, Professional Building
7837 Old York Road
Elkins Park, PA 19117

BEHREND AND ERNSBERGER

BY:/s/_____
Kenneth W. Behrend

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY

JOHN CHARNEY and ALICE CHARNEY, his wife, and JOHN CHARNEY, JR., their son, and JOHN CHARNEY as the parent and natural guardian of BRIAN CHARNEY, a minor, -Plaintiffs	COURT OF COMMON PLEAS WESTMORELAND COUNTY NO. 877 OF TERM, 1993 CIVIL ACTION - LAW

v.

ELAINE P. PANITZ, M.D.,
Defendant

CIVIL COURT EN BANC NOTICE FORM

Name of pleading filed: Preliminary Objections of Defendant, Elaine P. Panitz, M.D. to the Amended Complaint of the Plaintiffs, Along with supporting memorandum of law

Has the above captioned case been previously listed on any Court en Banc list? If yes, name the judge. _XX_ Yes ____No Bernard F. Scherer Judge

If this is a Preliminary Objection to a late joinder of an addition defendant, name the Judge who permitted the joinder. _____ Judge

Is transcript requested? __No__

Present this notice to the Court Administrator's Office for assignment prior to filing the motion.

Date & Time of presentment _____
Judge assigned _____

SERVE THE ORIGINAL AND ONE COPY OF THE MOTION UPON THE COURT ADMINISTRATOR. ATTACH THE WHITE COPY OF THIS NOTICE TO THE FRONT OF THE ORIGINAL MOTION AND FILE WITH THE PROTHONOTARY. SERVE A COPY OF THIS NOTICE AND THE MOTION UPON ALL PARTIES.

You, as the moving party, must file the original and one (1) copy of your brief with the Prothonotary within twenty (20) days of the filing of this motion if no transcript has been requested, and, if a transcript has been requested, within twenty (20) days of receiving notification that the transcript has been filed. In all cases, you must serve copies of your brief on all opposing parties or counsel before or immediately after filing your brief. Certification of Service must be filed within three (3) days of the filing the brief. Failure of the moving party to file a brief or certification of service thereof will result in dismissal of the motion.

The original and one (1) copy of the responding briefs are due within twenty (20) days of the filing of the moving party's briefs. Service must be made on all parties and certification of service must be filed within three (3) days of filing the brief with the Prothonotary and the Court Administrator. You will not be permitted to present oral argument if you fail a responding brief or certification of service.
List Opposing Attorneys and Address:
Kenneth W. Behrend, Esquire, 2400 Grant Building, Pittsburgh, PA 15219, counsel for Plaintiffs

FAILURE OF THE MOVING PARTY TO SERVE A COPY OF ALL MOTIONS AND PLEADINGS OR THE CIVIL COURT EN BANC NOTICE FORM ON ALL OPPOSING COUNSEL WILL RESULT IN THE DISMISSAL OF THE MOTION OR PRELIMINARY OBJECTION. CERTIFICATION OF SERVICE OF THE DOCUMENTS MUST BE FILED WITHIN THREE (3) DAYS OF THE FILING OF THOSE DOCUMENTS WITH THE PROTHONOTARY.

/s/ Alan S. Gold
Attorney for Defendant,
Elaine P. Panitz, M.D.

MONAGHAN & GOLD P.C.
BY: ALAN S. GOLD
ATTY. I.D. NO. 23400
7837 OLD YORK ROAD
ELKINS PARK, PA 19117
(215) 782-1800

ATTORNEY FOR DEFENDANT,
ELAINE P. PANITZ, M.D.

JOHN CHARNEY and ALICE CHARNEY, his wife, JOHN CHARNEY, JR., their son, and JOHN CHARNEY, as parent and natural guardian of BRIAN CHARNEY, a minor,
Plaintiffs

v.

ELAINE P. PANITZ, M.D.,
Defendant

COURT OF COMMON PLEAS
WESTMORELAND COUNTY

NO. 877 OF TERM, 1993

CIVIL ACTION - LAW

ORDER

AND NOW, this day of , 1993 it is hereby ORDERED and DECREED that the Preliminary Objections of Elaine P. Panitz, M.D. to the Amended Complaint of John Charney and Alice Charney, his wife, and John Charney, Jr., their son, and John Charney, as the parent and natural guardian of Brian Charney, a minor are granted and their Amended Complaint is dismissed with prejudice.

BY THE COURT:

_____

J.

Please be advised that you have twenty (20) days in which to respond to the Prel. Object. of Def.

MONAGHAN&GOLD, P.C.
BY: ALAN S. GOLD
ATTY. I.D. NO. 23400
7837 OLD YORK ROAD
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(215) 782-1800

ATTORNEY FOR DEFENDANT,
ELAINE P. PANITZ, M.D.

JOHN CHARNEY and ALICE CHARNEY, his wife, and JOHN CHARNEY, JR., their son, and JOHN CHARNEY, as the parent and natural guardian of BRIAN CHARNEY, a minor,

Plaintiffs

v.

ELAINE P. PANITZ, M.D.,

Defendant

COURT OF COMMON PLEAS
WESTMORELAND COUNTY

NO. 877 OF TERM, 1993

CIVIL ACTION - LAW

PRELIMINARY OBJECTIONS OF ELAINE P. PANITZ, M.D. TO THE AMENDED COMPLAINT OF THE PLAINTIFFS

Elaine P. Panitz, M.D. (hereinafter referred to as "Dr. Panitz") preliminarily objects to the amended complaint of John Charney and Alice Charney, his wife, and John Charney, Jr., their son, and John Charney, as the parent and natural guardian of Brian Charney, a minor (hereinafter collectively referred to as the "Charneys") and states in support thereof the following:

1. The Charneys have filed a amended complaint

against Dr. Panitz contending that Dr. Panitz failed to testify at trial for them in a case that they had brought against a third party in the manner in which she had promised. A copy of the amended complaint appears hereto as Exhibit "A".

2. According to the amended complaint in the case in which Dr. Panitz agreed to be an expert for the Charney she did testify. The Charneys only complain about what she said.

3. The Charneys possess no cause of action against Dr. Panitz because Dr. Panitz has an absolute privilege protecting anything that she said at trial regardless of her motivation or intent. This identical claim was brought against Dr. Panitz by the Charneys' attorneys in the underlying litigation in a counterclaim to Dr. Panitz's complaint for her expert witness fees. In response to preliminary objections by Dr. Panitz to the counterclaim, Judge Wettick of the Court of Common Pleas of Allegheny County held that the absolute privilege relating to testimony at trial defeated the counterclaim of the Charneys' attorneys. Judge Wettick granted the preliminary objections of Dr. Panitz and dismissed the counterclaim of the attorneys, Behrend & Ernsberger. A copy of that counterclaim is attached hereto as Exhibit "B". It is identical in all respects to the complaint of the Charneys. Judge Wettick issued an opinion to support his ruling. It is reported at 141 P.L.J. 203 (1993). A copy of the opinion appears hereto as Exhibit "C". For the reasons set forth in Judge Wettick's opinion an absolute privilege protects Dr. Panitz's testimony.

4. The Superior Court of Pennsylvania in Clodgo by Clodgo v. Bowman, 441 Pa. Super. 267, 601 A.2d 342 (1992) applied the absolute privilege to a case identical in all important respects to the one now before this Court. In Clodgo a mother sued to recover the child support that she should have been awarded in support proceedings. In the initial support proceeding, Dr. Bowman had been appointed by the trial court to conduct blood tests. He sent a letter to the court which stated that the blood tests established that the person whom the mother had sued could not be the child's biological father. On the basis of that statement, the court dismissed the support action. It was subsequently determined that Dr. Bowman had improperly recorded

the blood test results, thereby erroneously excluding the defendant as the father. The mother instituted a second support action which the court dismissed when the defendant raised res judicata as a defense. The mother, on behalf of herself and her child, then instituted a civil proceeding against Dr. Bowman based on medical malpractice. The trial court granted Dr. Bowman's preliminary objections in the nature of a demurrer on the basis of the absolute testimonial privilege for communications made in connection with judicial proceedings. The Superior Court concluded that no doubt existed that the communication made by Dr. Bowman occurred in the course of a judicial proceeding. Bowman made the comment directly to the court and the litigants. It was material and relevant to the paternity question at issue. Id. at 601 A.2d at 344.

5. In response to the argument of the mother's counsel that the absolute privilege only applied to defamation actions, the Superior Court in Clodgo said:

> Our precedent is clear. The form of the cause of action is not relevant to application of the privilege. Regardless of the tort contained in the complaint, if a communication was made in connection with judicial proceedings and was material and relevant to it, the privilege applies. Thus, while we agree with appellant's premise that this action is not premised upon defamation but is a medical malpractice action, this does not alter the conclusion that the privilege applies. Id. at 601 A.2d at 345. (emphasis added).

6. The Superior Court indicated that public policy required it to extend the privilege to Dr. Bowman and to other doctors in medical malpractice actions. According to the Superior Court:

> Our review of authority in other states reveals that medical malpractice actions have been instituted on the basis of expert opinions offered in judicial proceedings. If we carve out an exception to the judicial immunity for medical malpractice actions,

> dangerous precedent would result. Experts are called upon to offer medical opinions in a variety of situations in connection with judicial proceedings. An example is a psychiatrist asked to give an opinion of parental competency in a custody action. If we allow medical malpractice actions to survive application of the privilege, we open those experts to potential medical malpractice actions premised upon allegedly incorrect assessments of a parent's mental capacity to care for the children. (citation omitted). Similarly, a doctor who renders an opinion as to another doctor's medical malpractice in a civil action instituted by a patient would be open to claims of malpractice based upon that expert's opinion in the civil action. This simply cannot be allowed as the privilege is necessary to prevent a witness from refusing to testify based on the fear of potential civil liability. The rationale for the immunity applies just as strongly to medical malpractice actions as to any other type of civil action. Accordingly, we cannot allow an exception for the doctrine of judicial immunity where the cause of action contained in the complaint is medical malpractice. Id. at 601 A.2d at 345 and 346.

7. The decision of the Superior Court in Clodgo, supra 601 A.2d 342 compels the dismissal of the Charneys' amended complaint. Dr. Panitz's communication occurred in the context of a trial. She answered a question asked by counsel for the defendants. She uttered her comment directly to the court and the jury. It was material and relevant to the issues in the action. Failure to apply the absolute privilege in this case results in experts like Dr. Panitz being targets of malpractice actions every time they give an opinion on the stand in response to cross-examination which the party that hired them dislikes. Experts would become the guarantors of victory at trial. Every case involving an expert

would have the potential of resulting in a malpractice action against that expert. Many qualified individuals would refuse to testify. Many individuals who did testify might hesitate to tell the absolute truth.

8. The public policy of Pennsylvania bars the amended complaint of the Charneys. The Charneys seek to hold an expert witness responsible for money damages for testifying truthfully whenever the expert's testimony fails to fully support the retaining party's cause of action. The amended complaint does not deny that Dr. Panitz testified truthfully. Nowhere do the Charneys contend that Dr. Panitz provided anything less than completely truthful testimony at trial. All of the courts which have dealt with this issue have unanimously held that an expert has no duty to testify in a certain manner and that contracts which seek to impose such an obligation violate public policy. See Griffith v. Harris, 17 Wisc. 2d 255, 116 N.W. 2d 133 (1962) cert. denied. 373 U.S. 927 (1963); Curtis v. Wolfe, 160 Ill. App. 3d 588, 513 N.E. 2d 1139 (1987) app. denied 118 Ill. 2d 542, 520 N.E. 2d 384 (1988); Schaffer v. Donegan, 585 N.E. 2d 854 (Ohio App. 2 Dist. 1990).

9. Judge Wettick held in Panitz v. Behrend, et al., 141 P.L.J. 203 (1993) that permitting a cause of action against Dr. Panitz based on the conduct alleged by the Charneys' in their amended complaint violates the public policy of Pennsylvania.

10. The Charneys are playing a reprehensible game with the legal system in this case. Their attorneys brought an action in their own right seeking damages as a result of Dr. Panitz's testimony at trial on behalf of the Charneys. Having lost before Judge Wettick, and not willing to wait for the appeal process which they themselves commenced in the Superior Court, they have convinced their clients, the Charneys, to bring an identical action against Dr. Panitz in Westmoreland County, although the exact claim has been denied in Allegheny County. This kind of forum shopping should not be encouraged or permitted.

11. In Count II of their amended complaint the Charneys seek to recover based on economic loss only caused by negligence. The courts of the Commonwealth of Pennsylvania fail to recognize a cause of action for economic loss based on

negligence. See Spivack v. Berks Ridge Corp., Inc., 402 Pa. Super. 73, 586 A.2d 402 (1990).

12. In Count III of their amended complaint the Charneys fail to state a cause of action for negligent misrepresentation. In order to state a cause of action for negligent misrepresentation, there must be a misrepresentation of fact, not statements of opinion. The Charneys base their negligent misrepresentation claim on Dr. Panitz's statement of her expert opinion not on her misrepresentation of fact.

13. The Charneys' claim for negligent misrepresentation also fails because the alleged misrepresentations of Dr. Panitz consists of future facts.

14. A claim for negligent misrepresentation only exists relating to present or past facts.

15. Count IV of the amended complaint of the Charneys fails to state a cause of action for gross negligence. The courts of the Commonwealth of Pennsylvania recognize no such cause of action.

WHEREFORE, defendant Elaine P. Panitz, M.D. respectfully requests that her preliminary objections be granted and that the amended complaint of Charneys be dismissed with prejudice.

MONAGHAN & GOLD, P.C.

BY: /s/
ALAN S. GOLD
Attorney for Defendant,
Elaine P. Panitz, M.D.

7837 Old York Road
Elkins Park, PA 19117
(215) 782-1800

IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY, PENNSYLVANIA

JOHN CHARNEY and ALICE CHARNEY, his wife, and JOHN CHARNEY, JR., their son, and JOHN CHARNEY, as the parent and natural guardian of BRIAN CHARNEY, a minor,

Plaintiffs,

v.

ELAINE P. PANITZ,

Defendant.

CIVIL DIVISION

NO. 877 OF TERM, 1993

CODE:

PLAINTIFFS' ANSWER TO PRELIMINARY OBJECTIONS OF DEFENDANT, ELAINE P. PANITZ

Filed on behalf of John Charney, Alice Charney, John Charney, Jr., and Brian Charney, Plaintiffs

Counsel of Record for these parties:

Kenneth W. Behrend
PA I.D. No. 00406

BEHREND AND ERNSBERGER
Firm No. 018

2400 Grant Building
Pittsburgh, PA 15219
(412) 391-2515

JURY TRIAL DEMANDED

JOHN CHARNEY and ALICE CHARNEY, his wife, and JOHN CHARNEY, JR., their son, and JOHN CHARNEY, as the parent and natural guardian of BRIAN CHARNEY, a a minor,	:	COURT OF COMMON PLEAS
	:	WESTMORELAND COUNTY
	:	
	:	CIVIL ACTION - LAW
	:	
	:	NO. 877 OF TERM, 1993
	:	
	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
ELAINE B. PANITZ,	:	
	:	
Defendant.	:	

PLAINTIFFS' ANSWER TO PRELIMINARY OBJECTIONS OF ELAINE P. PANITZ

AND NOW, come the Plaintiffs, John Charney and Alice Charney, his wife, and John Charney, Jr., their son, and John Charney as the parent and natural guardian of Brian Charney, a minor, by and through their attorney Kenneth W. Behrend and the law firm of Behrend and Ernsberger, and files the following Answer to the Preliminary Objections of the Defendant, Elaine B. Panitz:

1. Paragraph number 1 is admitted insofar as the Plaintiffs did indeed file a amended complaint against the Defendant. Plaintiffs deny the balance of the paragraph as it is an inaccurate characterization of the nature of the Plaintiffs' amended complaint. The Defendant attempts to portray the amended complaint as an action against the Defendant for testifying contrary to promises made beforehand. The amended complaint was filed, instead, for the Defendant's deliberately misleading statements to the Plaintiffs prior to trial which had a serious adverse effect on the Plaintiffs' ability to properly evaluate their own case and in their

and their counsel's ability to make informed decisions and conduct the Plaintiffs' case in a knowledgeable and competent wanner.

2. Paragraph number 2 is admitted in part in that the Defendant did testify in the initial lawsuit brought against a third party. The statement that the Plaintiffs only complain about what the Defendant said (strongly implying that the Plaintiffs objected only to her testimony at trial) is a distortion of the Plaintiffs' case and is denied. The Plaintiffs filed their amended complaint because the Defendant failed to notify or advise the Plaintiffs or their counsel of her true expert opinions prior to giving testimony of such opinions in court. This was particularly improper because the Defendant had represented to the Plaintiffs and their counsel that her opinions were something entirely different from what they were in reality.

3. Paragraph number 3 is admitted in part and denied in part. It is admitted that Judge Wettick issued an opinion on the counterclaim filed by Behrend & Ernsberger. The balance of the paragraph is denied. The Defendant attempts to side-step the true issues in the amended complaint by focusing on the privilege a witness has in testifying at trial. Yet the Plaintiffs have never maintained that the Defendant or any other witness should do anything less than speak their own mind and tell the truth while testifying under oath at trial. The Plaintiffs complain instead that such truthfulness and honesty should also apply to the Defendant's dealings with the Plaintiffs prior to trial.

The Plaintiffs' amended complaint at bar is not identical with the counterclaim of Behrend and Ernsberger, neither in form nor identity of parties. The Plaintiffs, who had little to do with the counterclaim by Behrend and Ernsberger against Dr. Panitz, have not had their day in court although they have been grievously wronged by the Defendant, and so they now bring this amended complaint in the county in which they are domiciled. The Plaintiffs are relying on this Honorable Court to use its own judgment in deciding the merits of the Plaintiffs' case.

4. Paragraph number 4 is not an objection but rather merely an argument and conclusion of law supporting the objection in paragraph 3 and which should be more

properly included in Defendant's supporting brief. As such, no response is required to paragraph 4. To the extent that a response is required, paragraph number 4 is specifically denied. In fact, Defendant's paragraphs 4, 5, 6, and 7 are all arguments and conclusions of law that require no response and they represent a word-for-word recitation of pages 11 through 13 of the Defendant's brief submitted to the Superior Court in the Panitz v. Behrend & Ernsberger case, and is material more properly suited for Defendant's memorandum in law supporting her preliminary objections than the preliminary objections themselves. To the extent that a response is required, plaintiffs specifically deny paragraphs 5, 6 and 7. Plaintiffs will respond more fully to Defendant's paragraphs 4, 5, 6, and 7 in Plaintiffs' memorandum in law supporting Plaintiffs' answers to Defendant's preliminary objections.

5. Paragraph number 8 is specifically denied. The Plaintiffs deny that they seek to hold the Defendant responsible for testifying truthfully. The Plaintiffs instead seek to hold the Defendant responsible for being untruthful prior to testifying. The Defendant, seeking employment by the Plaintiffs, represented to the Plaintiffs her knowledge, skills and opinion to be one thing when, in fact, they were another, or if her opinion had substantially changed prior to testifying, she chose to keep that quiet rather than risk the possibility that the Plaintiffs would be forced to settle on the basis of her adverse opinion and the likelihood that her services would not then be needed. While a witness may not be able to contract to give certain testimony in a court of law, that witness can contract to appear and testify and as such is not at liberty to use fraud or deceit to induce a party to contract for her services. In addition, an expert witness hired by a party to litigation has additional duties to that party besides merely testifying at trial which include giving truthful and frank opinions to the hiring parties and their counsel in order to assist such parties in making informed decisions concerning the conduct of their case. Public policy demands that witnesses not only testify truthfully, but that they deal with the parties to the litigation in a truthful and honest manner even prior to giving testimony. The cases cited by

the Defendant on this issue in paragraph 8 are not on point and are more fully explained in Plaintiffs' accompanying brief in support of this Answer to Defendant's Preliminary Objections.

6. Paragraph number 9 is a continuation of Defendant's objection on public policy grounds delineated in detail in paragraph 8, but is nevertheless admitted insofar as Judge Wettick did express an opinion in Panitz v. Behrend, et al., but it is denied that the Plaintiffs' case at bar violates the public policy of Pennsylvania.

7. Paragraph number 10 is specifically denied. As indicated earlier, the case of Panitz v. Behrend et al., is before the Superior Court and involves this Defendant and Behrend & Ernsberger because this Defendant chose to sue Behrend & Ernsberger and not the Charneys. The Plaintiffs in the present action have a right for redress that was not attended to in the other lawsuit. The Plaintiffs have therefore asserted their right to bring their own action in the county of their domicile to recover damages they have suffered at the hands of the Defendant. This is the first time the Plaintiffs have filed any kind of action against the Defendant and they therefore can not be guilty of "forum shopping" as the Defendant alleges.

8. Paragraph number 11 is specifically denied. This paragraph is an impermissible mixture of objection and argument with case citations. The Plaintiffs are nevertheless compelled to respond to such a convoluted objection.

The Plaintiffs are entitled to economic losses due to the Defendant's negligence. Defendant cites Spivack v. Berks Ridge Corp., Inc., 402 Pa. Super. 73, 586 A.2d 402 (1990) as controlling, yet that case only refers to Aikens v. Baltimore & Ohio Railroad Co., 348 Pa. Super. 17, 501 A.2d 277 (1985), which, when carefully read, objects to the recovery of economic damages in a negligence action without physical injury or damage because the harm caused is usually unforeseeable. The Superior Court went on to say:

> A cause of action exists in this situation only if the tortious interference was intentional or involved parties in a special relationship to one another

(citations omitted).

> [N]egligent harm to economic advantage alone is too remote for recovery under a negligence theory. The reason a Plaintiff cannot recover stems from the fact that the negligent actor has no knowledge of the contract or prospective relation and thus has no reason to foresee any harm to the Plaintiff's interest (citations omitted). Aikens at p.278 & 279.

The foreseeable harm caused by the Defendant's actions, however, were known and obvious to all parties and the Defendant cannot hide behind the plea that the consequences of her actions were too remote to anticipate. See also the Restatement (Second) of Torts Sec. 766C, comments a and b.

9. Paragraph number 12 is denied. The fact that was misrepresented was that she held a particular opinion as well as her representations that she possessed the knowledge and skills necessary to back up her expert opinion. The true facts were that she chose to keep her true opinions to herself and misled the Plaintiffs for her own gain.

10. Paragraph number 13 is denied. The Defendant represented, at a specific point in time, that her opinion was one thing, when in fact, it was something else. The Plaintiffs had a right and a need to know the Defendant's honest expert opinion at that time prior to trial. That is when the negligent misrepresentation was made. The Plaintiffs relied upon and made decisions on the basis of Defendant's representations to their detriment as such representations by the Defendant were false. See the Restatement (Second) of Torts Sec. 552.

11. Paragraph number 14 is a conclusion of law that has no supporting authority or citations and is therefore denied.

12. Paragraph number 15 is denied. Gross negligence consists of the absence of even slight care and performing or failing to perform a duty in reckless disregard of the consequences, and is in accord with Pennsylvania law. Douglas W.

Randall, Inc. v. AFA Protective Systems, Inc., 516 F. Supp. 1122 (1981, E.D. Pa).

WHEREFORE, Plaintiffs respectfully request that the preliminary objections of Defendant Elaine P. Panitz be denied and that the Defendant be ordered to file a Reply to the Amended Complaint.

BEHREND & ERNSBERGER

/s/

Kenneth W. Behrend
Attorney for the Plaintiffs
2400 Grant Building
Pittsburgh, PA 15219
(412) 391-2515

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Plaintiffs' Answer to Preliminary Objections of Elaine P. Panitz, along with a supporting memorandum of law has been served upon the following counsel of record for the Appellee in the manner set forth below:

Service by First Class Mail
Addressed as follows:

Eugene Mattioni, Esquire
Mattioni, Mattioni & Mattioni, LTD.
399 Market Street, Second Floor
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Alan S. Gold, Esquire
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7837 Old York Road
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/s/
Kenneth W. Behrend
Attorney for Appellants

2400 Grant Building
Pittsburgh, PA 15219
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Dated: August 31, 1993

Elaine B. Panitz, M.D.P.A.
Occupational and Environmental Medicine

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In Reply:
34 Cleveland Lane
Princeton, NJ 08540

East Windsor Professional
One Mile Road Extension
Hightstown, New Jersey

BY FEDERAL EXPRESS

May 14, 1990

Daniel W. Ernsberger, Esquire
Behrend & Ernsberger
2400 Grant Building
Pittsburgh, PA 15219

Re: Charney v. Crawford Construction et al.
Your File Number: 88-0173

Dear Mr. Ernsberger:

At your request, I have reviewed medical and other records pertaining to each of the Charney family members, including John George Charney II (age 47), Alice Elizabeth Charney (age 37), John George Charney III (age 15), and Brian Richard Charney (age 13), as detailed in Appendix A. On 4/18/90 I obtained a complete medical and occupational history and performed a physical examination on each of the Charney family members, and appropriate laboratory was obtained in the same time frame (see Appendices B-E).

Exposure

Based on my review of available records, and history obtained from the family in person, it is clear that all four family members have suffered chronic exposure to airborne formaldehyde in the 10 Carlisle home. The exposure duration has been 13 years to date (summer 1977 to the present), with initial levels estimated at 0.16 to 0.59 PPM, and current levels (3/8/90) measured at .003-.005 PPM. the airborne formaldehyde has been due to release from a formaldehyde resin in plywood flooring.

DIAGNOSES AND IMPAIRMENTS

John George Charney III (Age 47)

1. History of chronic formaldehyde exposure, 1977 to present, confirmed by elevated IgG (1:32) and IgM (1:16) formaldehyde serum antibodies on 4/26/88.

2. Formaldehyde sensitization, due to 1., manifested by:
   a) Past history of skin rash, eye irritation, respiratory irritation and sensitization, and central nervous system dysfunction.
   b) Organic mental disorder (current).

3. Impairment: His formaldehyde sensitization is permanent and lifelong. His organic mental disorder will continue to cause him difficulty in interpersonal relationships for the indefinite future, jeopardizing both his marriage and his employability (as it has in the past I3 years). He is urged to change residence as soon as possible. He will require an older home, with old or used furnishings, in a rural setting, with no gas heat or air conditioning.

Alice Elizabeth Charney (Age 37)

1. History of chronic formaldehyde exposure, 1977 to present, confirmed by elevated IgG formaldehyde serum antibody

level (1:16) an 2/26/88.

2. Formaldehyde sensitization, due to) 1., manifested by:
   a) Fast history of eye irritation, respiratory irritation and sensitization, gastrointestinal dysfunction, and central nervous system dysfunction.
   b) Respiratory tract sensitization, with small airways dysfunction, confirmed on spirometry (current); organic mental disorder (current); gastrointestinal dysfunction (current).; reproductive dysfunction (current).

3. Impairment: Her formaldehyde sensitization is severe, permanent and lifelong. She is at risk for progression of her respiratory tract sensitization and her organic mental disorder. She is urged to remove herself from the current home on 10 Carlisle Drive. She will require an older home, with old or used furnishings, in a rural setting, with no gas heat or air conditioning. In my opinion, she is totally and permanently disabled from continuous employment due to the presence of formaldehyde in virtually all employment settings. I believe her marriage is also in jeopardy, at least in part due to continued exposure to formaldehyde.

John George Charney III (Age 15)

I. History of chronic formaldehyde exposure, 1977 to present, confirmed by elevated IgM formaldehyde serum antibody level (1:16) on 2/26/88.

2. Formaldehyde sensitization, due to I., manifested by:
   a) Past history respiratory irritation and sensitization, central nervous system dysfunction, and gastrointestinal dysfunction.

b) Respiratory tract sensitization, with small airways dysfunction confirmed by spirometry (current); organic mental disorder (current), gastrointestinal dysfunction (current).

3. Impairment: His formaldehyde sensitization is severe, permanent, and lifelong. He is clearly a depressed child. He is currently having difficulty maintaining attendance and performance at school. In fashion, in my opinion, he will be totally and permanently disabled from continuous employment when he completes schooling, due to the presence of formaldehyde in virtually all employment settings. It is urgent that his continued formaldehyde exposure at 10 Carlisle be terminated, to prevent further deterioration of his central nervous System function. He will require an older home, with old or used furnishings, in a rural setting, with no gas heat or air conditioning.

Brian Richard Charney (Age 13)

1. History of chronic formaldehyde exposure, 1977 to present, with elevated IgM formaldehyde serum antibody level (1.16) an 2/26/88.

2. Formaldehyde sensitization, due to 1., manifested by:

a) Past history of skin rash, respiratory irritation and sensitization, central nervous system dysfunction, and gastrointestinal dysfunction.

b) Respiratory tract sensitization with small airways dysfunction, confirmed on spirometry (current); organic mental disorder (current); gastrointestinal dysfunction (current).

3. Impairment. His formaldehyde sensitization is severe, permanent, and lifelong. Although he appears less depressed than his brother John, he too has been struggling to maintain attendance in his schooling.

In like fashion, in my opinion, he will be totally and permanently disabled from continuous employment upon completion of his schooling, due to the presence of formaldehyde in virtually all employment settings. It is urged that he be removed from the current home on 10 Carlisle Drive, to prevent further respiratory tract sensitization and central nervous system dysfunction. He will require an older home, with old or used furnishings, in a rural setting, with no gas heat or air conditioning.

Future Health Care

All of the Charneys will required frequent supportive medical care, to deal with the continuing skin, respiratory, gastrointestinal, neurologic, and neuropsychological disorders arising from formaldehyde sensitization. In my opinion, Mr. and Mrs. Charney need psychological and marital counseling on an ongoing basis, to deal with the additional stress imposed by their continuing health problems. John III is in urgent need of psychological support at this time, and I believe both children will need cognitive rehabilitation and psychological support as their learning problems cause emotional stress in the future.

Yours truly,

Elaine B. Panitz, MD

EBP/jp
Enclosures

No. 95-1696

Supreme Court, U.S.
FILED
MAY 22 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

JOHN CHARNEY, ALICE CHARNEY, JOHN CHARNEY, JR. and BRIAN CHARNEY, a Minor, by JOHN CHARNEY, his Guardian,

Petitioners,

vs.

ELAINE B. PANITZ, M.D.,

Respondent.

On Petition for Writ of Certiorari to the Superior Court of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION

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30 pp

QUESTIONS PRESENTED

1. Does this Court have jurisdiction to grant review pursuant to 28 U.S.C. § 1257 when the petitioners never raised any federal constitutional issue in the trial court, in the intermediate appellate court, or in the Pennsylvania Supreme Court concerning expert immunity and when the Supreme Court of Pennsylvania never decided any issues in the case?

2. Should this Court grant review to consider the applicability of a common law immunity based solely on Pennsylvania common law when no federal constitutional claim exists?

3. Should this Court review the constitutionality of witness immunity when utilized to bar a state law claim when it has already determined in *Briscoe v. LaHue*, 460 U.S. 325 (1983) that witness immunity bars a constitutional claim brought pursuant to 42 U.S.C. § 1983?

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STATEMENT OF JURISDICTION

This Court lacks jurisdiction over this case pursuant to 28 U.S.C. § 1257(a) because the petitioners never presented their federal constitutional claims relating to expert immunity to any state court and because the Pennsylvania Supreme Court refused to address any issue raised by the petitioners.

STATEMENT OF THE CASE

John Charney, Alice Charney, John Charney, Jr. and Brian Charney, a minor by John Charney as Guardian (hereinafter referred to as "the Charneys") ask this Court to usurp the very basic right of state courts to determine their own common law immunities when dealing with state law causes of action. They attempt to create a constitutional claim where none exists. The Charneys never properly raised any constitutional issue in the courts below. None of the courts below ever dealt with the Charneys nonexistent constitutional claim because no one ever presented it to them.

The Charneys filed an amended complaint against Elaine B. Panitz, M.D. (hereinafter referred to as "Dr. Panitz") alleging that Dr. Panitz negligently provided expert testimony for them in a case in which they were plaintiffs. (Petitioners' Appendix 12a). The amended complaint of the Charneys attempted to assert causes of action against Dr. Panitz based on breach of contract, negligence, negligent misrepresentation and gross negligence. (Petitioners' Appendix 12a to 27a). Despite the assertion of the Charneys in their brief in this Court, they *never* set forth a cause of action based on fraud or fraudulent inducement against Dr. Panitz. An examination of the amended complaint shows no such allegations anywhere. (Petitioners' Appendix 12a to 27a). No factual averment of fraud appears anywhere in the amended complaint. (Petitioners' Appendix 12a to 27a).

The Charneys allege that Dr. Panitz promised to present specific testimony at trial in the case of *Charney v. Crawford Construction Co.*, Westmoreland County, No. 5306, 1984 (Petitioners' Appendix 17a, 18a). The Charneys contended that Crawford Construction Co. injured them by exposing them to formaldehyde. (Petitioners' Appendix 12a to 27a). Although Dr. Panitz testified for the Charneys at trial, she failed to answer certain cross-examination questions in the way that she had allegedly represented to the Charneys that she would. (Petitioners' Appendix 15a). Based on the courtroom testimony of Dr. Panitz, the Charneys seek damages consisting of what they would have recovered from Crawford Construction Co. if Dr. Panitz had provided the testimony that she allegedly promised. The Charneys also request the legal fees and expenses they incurred in bringing their case against Crawford Construction Co. and the fees they paid to Dr. Panitz. The Charneys contend that they lost their case at trial against Crawford Construction Co. because of the testimony of Dr. Panitz. (Petitioners' Appendix 12a to 27a).

Dr. Panitz filed preliminary objections to the amended complaint of the Charneys claiming that she had an absolute privilege protecting what she said at trial and prior to trial regardless of her motivation or intent. (Petitioners' Appendix 33a). After permitting extensive briefing by the Charneys and Dr. Panitz and after conducting oral argument, the Honorable Bernard F. Scherer, Judge of the Court of Common Pleas of Westmoreland County, granted the preliminary objections of Dr. Panitz based on the absolute privilege as applied by the Superior Court of Pennsylvania in this identical case in *Panitz v. Behrend,* 429 Pa. Super. 273, 632 A.2d 562 (1993) (Petitioners' Appendix 7a). The Superior Court affirmed the decision of Judge Scherer and remanded for the imposition of attorney's fees against the Charneys. *See Charney v. Panitz,* Superior Court of Pennsylvania No. 02033 Pittsburgh, 1993. (Petitioners'

Appendix 3a). The Charneys submitted a petition for allowance of appeal to the Supreme Court of Pennsylvania, which the Supreme Court of Pennsylvania granted on March 6, 1995. After reviewing briefs on the merits and hearing oral argument the Supreme Court of Pennsylvania on January 18, 1996 declined to decide the matter. Instead, the Supreme Court of Pennsylvania dismissed the appeal "as having been improvidently granted." (Petitioners' Appendix 1a). The Supreme Court of Pennsylvania never decided any of the issues presented by the Charneys. Instead, the Supreme Court of Pennsylvania concluded that it should not exercise its discretionary jurisdiction to hear the matter.

The law firm of Behrend & Ernsberger, which currently represents the Charneys in this case, also represented the Charneys in their unsuccessful case against Crawford Construction Co. Behrend & Ernsberger filed a counterclaim against Dr. Panitz in a suit she commenced for expert witness fees in the Court of Common Pleas of Allegheny County relating to the testimony that she provided for the Charneys in their case against Crawford Construction Co. The counterclaim of Behrend & Ernsberger alleged identical causes of action against Dr. Panitz for the identical conduct and testimony in the same case as now asserted by the Charneys in their lawsuit before this Court.

The Honorable R. Stanton Wettick, Jr., Judge of the Court of Common Pleas of Allegheny County, granted Dr. Panitz's preliminary objections to the counterclaim of Behrend & Ernsberger based on Dr. Panitz having an absolute privilege. *Panitz v. Behrend,* 141 P.L.J. 203 (1993). Behrend & Ernsberger appealed Judge Wettick's decision to the Superior Court of Pennsylvania. The Superior Court in *Panitz v. Behrend, supra,* 632 A.2d 562 (1993) held that the absolute privilege for a witness

in a judicial proceeding applied to an expert's testimony at trial and to the representations made by the expert prior to trial.

Behrend & Ernsberger appealed the Superior Court's decision by means of a petition for allowance of appeal to the Supreme Court of Pennsylvania. The Supreme Court of Pennsylvania denied that petition.

The Superior Court in *Charney v. Panitz,* relied upon its decision in *Panitz v. Behrend, supra,* 632 A.2d 562, a mere seven months before, to impose attorneys fees against the Charneys based on Pennsylvania Rule of Civil Procedure 2744. That rule permits the Superior Court to award attorneys fees for a frivolous appeal. The Superior Court concluded that because of its prior decision in the identical case seven months before, the appeal was frivolous since the realistic chances of ultimate success were slight and the continuation of the contest was unreasonable. (Petitioners' Appendix 4a). The Superior Court remanded the case to the trial court to assess the amount of counsel fees. The trial court never did so because of the Charneys' appeal to the Pennsylvania Supreme Court.

The Charneys attached to their amended complaint as an exhibit a three page extract of deposition testimony Dr. Panitz gave in an unrelated law suit which the Charneys called the "Crown Point" litigation (hereinafter referred to as the "Crown Point deposition"). (Petitioners' Appendi 29a to 31a). Allegedly relying on the extracted pages of the Crown Point deposition, the Charneys, through their attorneys Behrend & Ernsberger, acquired their understanding of what Dr. Panitz would testify to at the Charneys' trial with respect to formaldehyde sensitization in tobacco smokers. The Charneys relied solely on these pages in the Crown Point deposition for all of their claims set forth in their amended complaint against Dr. Panitz. (Petitioners' Appendix 17a, Paragraph 27). Their entire amended complaint

arises from these pages and the trial testimony of Dr. Panitz. (Petitioners' Appendix 13a to 17a).

The three page excerpt from the Crown Point deposition contains several reservations and expressions of uncertainty with respect to formaldehyde sensitization among tobacco smokers. For example, Dr. Panitz stated:

> . . . it is my understanding that the 40 parts per million represents the formaldehyde generated in, say, a room where there is a cigarette being smoked . . . *I'm not sure* that that means the individual is pulling in 40 parts per million formaldehyde into his lungs. *I don't personally know* what the concentration is when you're pulling it into their lungs.

(Petitioners' Appendix 29a) (emphasis added).

> . . . *I cannot explain* why certain of the individuals who I believe are sensitized to formaldehyde do not react to cigarette smoke when they smoke. *It's possible* that they do react and they are suppressing the symptoms and don't wish to recognize that the cigarette smoke is bothering them, *that's possible, but I otherwise can't explain it.*

(Petitioners' Appendix 31a) (emphasis added).

The Charneys fail to allege in their amended complaint that Dr. Panitz testified falsely at trial or that she deliberately withheld testimony at trial because of malice or fraud. (12a to 27a, Petitioners' Appendix). Nor do the Charneys allege that Dr.

Panitz failed to appear at trial when required. (Petitioners' Appendix 12a to 27a).[1]

REASONS FOR DENYING THE WRIT

I.

PETITIONERS NEVER RAISED ANY FEDERAL CONSTITUTIONAL ISSUE IN THE TRIAL COURT, IN THE SUPERIOR COURT OR IN THE PENNSYLVANIA SUPREME COURT.

The Charneys never presented any federal constitutional question to the trial court in this case. The preliminary objections of Dr. Panitz raised the issue of witness immunity. (33a, Petitioners' Appendix). In response the Charneys failed to present any constitutional argument concerning witness or expert immunity.

On appeal to the Superior Court of Pennsylvania the Charneys never raised any federal constitutional issue. They presented the following "Statement of the Questions Involved" to the Superior Court:

> I. WHETHER THE TORTIOUS ACTS OF AN EXPERT, COMMITTED TO ENGAGE AND RETAIN THE EXPERT'S EMPLOYMENT BY A LITIGANT AND/OR THEIR COUNSEL IN A CIVIL ACTION, SHOULD

---

1. Although Dr. Panitz, for purposes of her preliminary objections only, conceded the truthfulness of the accusations set forth in the amended complaint, she vigorously denies that she ever made any misrepresentations to the Charneys or their attorneys. She also vigorously denies that she changed her testimony at trial.

BE EXCUSED FROM CIVIL LIABILITY BECAUSE, OR IF, THAT EXPERT SUBSEQUENTLY TESTIFIES AT THE LITIGANT'S TRIAL.

Answered in the Affirmative by the Court below.

II. WHETHER WITNESS IMMUNITY FROM CIVIL LIABILITY FOR COMMUNICATIONS IN JUDICIAL PROCEEDINGS SHOULD BE EXPANDED SO AS TO INCLUDE EVEN THE PRELIMINARY, INITIAL CONTACT BETWEEN AN EXPERT AND A PARTY, BEFORE THE EXPERT IS HIRED TO TESTIFY OR BEFORE A FINAL DECISION HAS BEEN MADE BY THE PARTY AS TO WHETHER THE EXPERT WILL TESTIFY AS A WITNESS.

Answered in the Affirmative by the Court below.

III. WHETHER AN EXPERT WITNESS, WHO REPRESENTS THEIR EXPERT OPINION TO BE ONE THING, AND IS THEN RETAINED BY A PARTY AND/OR THEIR ATTORNEY TO TESTIFY ON THAT PARTY'S BEHALF AT TRIAL, HAS A DUTY TO INFORM THE HIRING PARTY AND/OR THEIR ATTORNEY OF A CHANGE IN THAT EXPERT'S OPINION FROM WHAT HAD BEEN REPRESENTED, PRIOR TO TRIAL, SO THAT

PARTY AND THEIR ATTORNEY CAN MAKE INFORMED DECISIONS REGARDING THE CONDUCT OF THAT PARTY'S CASE INCLUDING THE POSSIBLE SETTLEMENT THEREOF.

Answered in the Negative by the Court below.

IV. WHETHER IN GRANTING WITNESS IMMUNITY FROM CIVIL LIABILITY FOR COMMUNICATIONS MADE PRIOR TO TRIAL, THE COURT SHOULD MAKE A DISTINCTION BETWEEN, AND APPLY DIFFERENT STANDARDS TO, EXPERT WITNESSES AND FACT WITNESSES.

Answered in the Negative by the Court below.

(Respondents' Appendix 1a to 2a).

Not an inference of a federal constitutional issue appears in the "Statement of the Questions Involved" presented by the Charneys to the Superior Court of Pennsylvania. An examination of the Charneys brief submitted to the Superior Court shows a one sentence mention of a federal constitutional claim without any citations or any indication of the nature of the constitutional claim. Because of the failure of the Charneys to raise any constitutional issue, the Superior Court never dealt with it in its opinion. (Petitioners' Appendix 3a). The Superior Court lacked the ability to decide what the Charneys had never presented to it.

The same situation existed in the Supreme Court of Pennsylvania. The Charneys submitted the following

"Statement of the Questions Involved" to the Supreme Court of Pennsylvania:

> I. Substantiative Question of First Impression: Should the Supreme Court of Pennsylvania extend the privilege of witness immunity beyond the traditional approach accepted in this Commonwealth where a witness that is adverse cannot be sued in a subsequent action for defamation, defamation-type claim or a retaliatory type claim based upon the adverse testimony, to include a professional who agrees to serve as an advocate for the party's position and to provide litigation-related services for compensation, if there is professional negligence in providing the agreed services?
>
> ANSWER: In the Affirmative by the Superior Court.
>
> II. Additional Substantive Question of First Impression: Should the Superior Court of Pennsylvania be permitted to assess a party counsel fees for appealing a case to the Superior Court when the controlling and deciding issue is an issue of first impression, and has never (sic) decided by the Supreme Court of Pennsylvania?
>
> ANSWER: In the Affirmative by the Superior Court.
>
> III. May the Trial Court affirmed by the Superior Court, make a factual finding,

> essential to its decision, which is not contained in and is contrary to the pleadings of Appellant-Plaintiff, where the only facts before the Court are pleadings, there having been no testimony?
>
> ANSWER: In the Affirmative by the Superior Court.

(Respondents' Appendix 3a to 4a).

An examination of the statement shows no mention of any constitutional claim concerning expert immunity.

The same defect exists concerning the Charneys contention relating to attorneys fees. They never raised any federal constitutional claim in their "Statement of the Questions Involved" before the Supreme Court of Pennsylvania. (Respondents' Appendix 3a to 4a). They only raised the issue of a constitutional violation concerning attorneys' fees in a footnote to their brief. They submitted no case authority to support their position. The Supreme Court of Pennsylvania declined to rule on their claim. (Petitioners' Appendix 1a).

This Court refuses to review judgments rendered by the highest court of a state unless a federal question has been both raised and decided in that court. *Yee v. City of Escondido*, 503 U.S. 519, 523-33 (1992)(in reviewing judgments of state courts under 28 U.S.C. §1257 the Court will refuse to consider claims that were not raised or addressed below). *See also, Beck v. Washington*, 369 U.S. 541, 549-53 (1962)(because petitioner failed to argue equal protection in state court, question was not before the Supreme Court). Here the Charneys failed to present their constitutional claim to the Supreme Court of Pennsylvania. The Pennsylvania Supreme Court *refused to consider any claim advanced by the Charneys.* (Petitioners' Appendix 1a).

The Charneys ask this Court to decide a constitutional claim that they neglected to raise in the trial court, in the intermediate appellate court or in the Supreme Court of Pennsylvania. No party to the litigation ever submitted an argument concerning the constitutional violations now alleged for the first time in this Court by the Charneys. No state court judge or state court justice ever had the opportunity to consider the constitutional claim now presented by the Charneys.

The Charneys ask this Court to decide their constitutional arguments for the first time without the benefit of an adequate record reflecting litigation of the constitutional challenge and without the benefit of either a trial court or appellate decision considering the constitutional challenge. The Charneys request that this Court decide their constitutional claim in a vacuum. As a court of last resort this Court refuses to function in such a manner. The Charneys cannot litigate a multitude of other issues relating to the law of the Commonwealth of Pennsylvania without any federal constitutional dimension and then at the last moment when all else has failed raise a federal constitutional issue before this Court for the first time.

II.

THE PENNSYLVANIA SUPREME COURT NEVER DECIDED THE CLAIM OF THE PETITIONERS, BUT EXERCISED ITS DISCRETIONARY AUTHORITY TO DECLINE REVIEW AFTER HAVING HEARD ORAL ARGUMENT AND EXAMINING BRIEFS ON THE MERITS.

Rule 10(b) of the rules of this Court set forth as one of the Court's considerations in granting certiorari whether:

> . . . a state court of last resort has decided an

> important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; . . . .

The Charneys rely upon this provision to support their petition for certiorari. But, the state court of last resort, the Pennsylvania Supreme Court, never decided any of the issues presented by the Charneys to the Pennsylvania Superior Court or to this Court. (Petitioners' Appendix 1a). The Pennsylvania Supreme Court decided nothing in this case. It only determined not to review the matter. Consequently, no state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or with a decision of the United States Court of Appeals. No basis exists for granting the Charneys' petition for certiorari.

III.

NO CONFLICT EXISTS AMONG THE STATE COURTS CONCERNING THE CONSTITUTIONALITY OF WITNESS IMMUNITY AS APPLIED TO EXPERTS.

The Charneys ask this Court to grant their petition for a writ of certiorari primarily based on their contention that a conflict exists among the various state supreme courts concerning immunity against suit for testimony by expert witnesses. An examination of the cases cited by the Charneys for this proposition show that no such conflict exists. None of the cases deal with any constitutional issue. In the cases relied upon by the Charneys, *Bruce v. Byrne-Stevens & Assoc. Eng., Inc.*, 113 Wash. 2d 123, 776 P.2d 666 (1989); *James v. Brown*, 637 S.W. 2d 914 (Tex. 1982); *Levine v. Wiss & Co.*, 97 N.J. 242, 478 A.2d 397 (1984); *Matco Forge, Inc. v. Arthur Young & Co.*, 5 Cal. App. 4th 392, 6 Cal. Reptr. 2d 781 (1992) and *Murphy v. A.A. Mathews,*

841 S.W. 2d 671 (Mo. 1992), the courts decided the applicability or lack of applicability of the expert immunity based on their interpretation of the common law and statutes of their respective states. None of these decisions ever mention any federal constitutional problem with witness or expert immunity. The Pennsylvania courts in dealing with the Charneys' claim never discussed any constitutional claim or problem relating to witness or expert immunity.

The Charneys ask this Court to federalize the common law of the fifty states. They want this Court to decide what Pennsylvania law should be concerning expert immunity. They request that this Court set itself up as a super state supreme court for all fifty states. No reason exists to accept this extraordinary invitation. To do so results in a major infringement on the rights of the states to determine their own common law.

This Court stated in *Braxton v. United States*, 500 U.S. 344 (1991):

> A principal purpose for which we use our certiorari jurisdiction, and the reason we granted certiorari in the present case, is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law. See this Court's Rule 10.1.

Id. at 500 U.S. at 345.

In the case now before this Court no conflict exists among the state courts concerning any provision of federal law. No reason exists for this Court to determine what the common law of Pennsylvania should be concerning witness immunity.

IV.

THIS COURT IN *BRISCOE V. LAHUE*, 460 U.S. 325 (1983) HAS ALREADY DECIDED THAT THE UTILIZATION OF WITNESS IMMUNITY CREATES NO CONSTITUTIONAL VIOLATION.

This Court has on many occasions upheld the utilization of common law immunities to bar or limit constitutional claims. In *Briscoe v. LaHue*, 460 U.S. 325 (1983) plaintiffs brought a claim pursuant to 42 U.S.C. § 1983 contending that local police officers had violated their constitutional rights to due process pursuant to the Fourteenth Amendment of the United States Constitution by providing perjured testimony at the plaintiffs' criminal trials resulting in their unfair and unlawful conviction for crimes that they claim they never committed. This Court concluded that common law witness immunity barred the constitutional claims of the plaintiffs.

The analysis of this Court results in the Charneys having no constitutional claim. If a common law immunity bars a federal cause of action for a constitutional violation, how can the utilization of that same common law immunity to bar a state law claim devoid of any constitutional dimension raise a constitutional question? It cannot as a matter of law.

V.

GRANTING REVIEW IN THIS CASE WILL RESULT IN CHAOS AND CONFUSION IN THE STATE COURTS OF ALL FIFTY STATES BECAUSE IT WILL CAST INTO DOUBT THE VALIDITY OF EVERY QUALIFIED IMMUNITY OR COMMON LAW IMMUNITY UTILIZED BY THOSE STATES AS DEFENSES TO STATE LAW CAUSES OF ACTION.

The granting of certiorari by this Court will result in confusion and chaos in the courts of the fifty states. Every plaintiff in every civil action in which any kind of immunity defense exists based on the common law of the various states will seek to overcome that immunity by alleging a constitutional violation. This results in the federalization of the common law of the fifty states. The fifty state supreme courts will lose in large measure the ability to determine what common law immunities they wish to apply and the scope of those immunities. It casts into doubt settled case law in all of the states.

The Charneys concede that the issue that they raise affects thousands of law suits. Multiply those thousands of law suits by the number of times immunity defenses occur in all tort actions in all the fifty states. A tidal wave of constitutional litigation results from granting certiorari in this case. What purpose does the creation of such a tidal wave serve?

No indication exists that the state courts have been unable to determine for themselves whether to apply common law immunities. Our federal constitution requires that this Court permit the state supreme courts to follow different paths from each other in developing their common law. This diversity encourages new ideas and experimentation. The constitutionalization of the development of the common law

puts an end to the federal system as we know it. It creates an intellectual straight jacket which stifles creativity and diversity.

VI.

AN ALTERNATIVE BASIS EXISTED FOR THE DISMISSAL OF EACH OF THE COUNTS OF THE AMENDED COMPLAINT INDEPENDENT OF EXPERT IMMUNITY.

This Court never decides constitutional issues if it can resolve a claim by other means. In this case, Dr. Panitz challenged the amended complaint of the Charneys on grounds other than expert immunity.

This Court need not decide the Charneys' challenge to expert testimony. Independent grounds exist to dismiss the amended complaint. The entire amended complaint suffers from a serious defect arising pursuant to the law of the Commonwealth of Pennsylvania. The allegations of the amended complaint depend upon the prior deposition testimony of Dr. Panitz in the *Crown Point* litigation. The Charneys concede that they relied exclusively upon that deposition testimony to form their belief as to Dr. Panitz' proposed testimony at trial. An examination of that testimony, attached to the amended complaint as an exhibit, shows that no basis for such reliance exists as a matter of law. Dr. Panitz indicated that she could not even explain why certain individuals who were sensitized to formaldehyde failed to react to cigarette smoke. She came up with a *possible* explanation but indicated that she *could not* really explain it. (Petitioners' Appendix 30a and 31a).

Other independent reasons exist to support the dismissal of all the counts in the amended complaint against Dr. Panitz. Dr. Panitz appropriately raised these alternative grounds in her preliminary objections. (Petitioners' Appendix 37a to 42a).

VII.

NO BASIS EXISTS FOR THIS COURT TO REVIEW THE SUPERIOR COURT OF PENNSYLVANIA'S AWARD OF ATTORNEYS FEES PURSUANT TO PENNSYLVANIA RULE OF APPELLATE PROCEDURE 2744 WHEN NO CONSTITUTIONAL ISSUES EXIST AND WHEN THE COURT EXERCISED ITS LEGITIMATE DISCRETION IN DETERMINING THAT THE APPEAL OF THE PETITIONERS WAS FRIVOLOUS SINCE IT RAISED AN ISSUE ALREADY DECIDED IN THE VERY SAME CASE SEVEN MONTHS BEFORE.

The Superior Court of Pennsylvania properly exercised its discretion in awarding attorneys fees pursuant to Pennsylvania Rule of Appellate Procedure 2744. That rule states that a Pennsylvania Appellate Court may award reasonable counsel fees and damages for delay:

> . . . if it determines that an appeal is frivolous or taken solely for delay or that the conduct of the participant against whom costs are to be imposed is dilatory, obdurate or vexatious. The appellate court may remand the case to the trial court to determine the amount of damages authorized by this rule.

The appeal of the Charneys was frivolous because the realistic chances of ultimate success were slight and continuation of the contest was unreasonable. (Petitioners' Appendix 4a and 5a). An examination of the facts before the Superior Court supports that decision. Counsel for the Charneys, Behrend & Ernsberger, litigated the exact same issue presented by the Charneys in the exact same case before the Superior Court seven months before the appeal of the Charneys.

The decision in that case, *Panitz v. Behrend, supra*, 632 A.2d 562 bound the Superior Court as to the Charneys' claim. The Charneys knew that this decision mandated the defeat of their amended complaint.

According to the Charneys, the possibility that the Supreme Court could overrule the decision of the Superior Court in *Panitz, supra,* permitted them to ask the Superior Court to disregard its own recent ruling. This means that no appeal could ever be frivolous since the possibility of reversal by the Pennsylvania Supreme Court always exists. This argument establishes too much. At some point, the Superior Court must be able to tell parties that appealing the same issue that has just been litigated adversely to them will result in the imposition of sanctions. Otherwise, parties will be encouraged to file frivolous appeals. An already overwhelmed Superior Court will be inundated with meritless appeals concerning issues which the court has already decided many times over.

The Charneys had adequate notice of the request of Dr. Panitz for attorneys fees. It appeared in her brief in the Superior Court. The Charneys had the opportunity to address the issue in a reply brief and at oral argument. (Respondents' Appendix 3a to 4a).

The Charneys ask this Court to infringe upon a state appellate court's discretion in determining when a party has acted in a frivolous manner. This issue presents no constitutional claim. State courts must have the same rights that the federal courts do to control their docket and to penalize parties and attorneys who inappropriately and unfairly subvert the smooth functioning of their courts.

The Charneys never identify the nature of their constitutional violation. They make one conclusory statement

that the order for counsel fees violated the Fifth and Fourteenth Amendments of the Constitution of the United States. How?

They rely on this Court's opinion in *Roadway Express v. Piper*, 447 U.S. 752 (1980). But this Court in that decision never dealt with any constitutional claim. Instead, this Court interpreted various statutes enacted by congress relating to the imposition of costs and attorneys fees. No constitutional issue appeared in that case. This Court decided no constitutional claim in that case.

The Charneys wish this Court to infringe upon the ability of the Pennsylvania appellate courts to control the conduct of the parties and attorneys appearing before it. In this case the Charneys filed an appeal raising an issue already decided against their counsel in the same case seven months before. They presented no new argument. They presented no new case law. This fails to raise any constitutional claim. Instead, it displays the need for state courts to have the same power that this Court has to control frivolous litigation.

The Charneys still have the opportunity to challenge the amount of the attorneys' fees in the trial court. The Superior Court directed the trial court to determine the amount of the attorneys' fees. The trial court has not done this yet. It is premature to review the attorneys' fee issue.

CONCLUSION

In the light of the foregoing, Elaine B. Panitz, M.D. respectfully requests that this Court deny the petition for certiorari of the Charneys.

Respectfully submitted,

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APPENDIX A — PETITIONERS' STATEMENT OF THE QUESTIONS INVOLVED IN THE SUPERIOR COURT

STATEMENT OF THE QUESTIONS INVOLVED

I. **WHETHER THE TORTIOUS ACTS OF AN EXPERT, COMMITTED TO ENGAGE AND RETAIN THE EXPERT'S EMPLOYMENT BY A LITIGANT AND/OR THEIR COUNSEL IN A CIVIL ACTION, SHOULD BE EXCUSED FROM CIVIL LIABILITY BECAUSE, OR IF, THAT EXPERT SUBSEQUENTLY TESTIFIES AT THE LITIGANT'S TRIAL.**

Answered in the Affirmative by the Court below.

II. **WHETHER WITNESS IMMUNITY FROM CIVIL LIABILITY FOR COMMUNICATIONS IN JUDICIAL PROCEEDINGS SHOULD BE EXPANDED SO AS TO INCLUDE EVEN THE PRELIMINARY, INITIAL CONTACT BETWEEN AN EXPERT AND A PARTY, BEFORE THE EXPERT IS HIRED TO TESTIFY OR BEFORE A FINAL DECISION HAS BEEN MADE BY THE PARTY AS TO WHETHER THE EXPERT WILL TESTIFY AS A WITNESS.**

Answered in the Affirmative by the Court below.

III. **WHETHER AN EXPERT WITNESS, WHO REPRESENTS THEIR EXPERT OPINION TO BB ONE THING, AND IS THEN RETAINED BY A PARTY AND/OR THEIR ATTORNEY TO TESTIFY ON THAT PARTY'S BEHALF AT TRIAL, HAS A DUTY TO INFORM THE HIRING PARTY AND/OR THEIR ATTORNEY OF A CHANGE IN THAT EXPERT'S**

Appendix A

OPINION FROM WHAT HAD BEEN REPRESENTED, PRIOR TO TRIAL, SO THAT PARTY AND THEIR ATTORNEY CAN MAKE INFORMED DECISIONS REGARDING THE CONDUCT OF THAT PARTY'S CASE INCLUDING THE POSSIBLE SETTLEMENT THEREOF.

Answered in the Negative by the Court below.

IV. **WHETHER IN GRANTING WITNESS IMMUNITY FROM CIVIL LIABILITY FOR COMMUNICATIONS MADE PRIOR TO TRIAL, THE COURT SHOULD MAKE A DISTINCTION BETWEEN, AND APPLY DIFFERENT STANDARDS TO, EXPERT WITNESSES AND FACT WITNESSES.**

Answered in the Negative by the Court below.

APPENDIX B — PETITIONERS' STATEMENT OF THE QUESTIONS INVOLVED IN THE PENNSYLVANIA SUPREME COURT

STATEMENT OF THE QUESTIONS INVOLVED

I. **SUBSTANTIATIVE QUESTION OF FIRST IMPRESSION: SHOULD THE SUPREME COURT OF PENNSYLVANIA EXTEND THE PRIVILEGE OF WITNESS IMMUNITY BEYOND THE TRADITIONAL APPROACH ACCEPTED IN THIS COMMONWEALTH WHERE A WITNESS THAT IS ADVERSE CANNOT BE SUED IN A SUBSEQUENT ACTION FOR DEFAMATION, DEFAMATION-TYPE CLAIM OR A RETALIATORY TYPE CLAIM BASED UPON THE ADVERSE TESTIMONY, TO INCLUDE A PROFESSIONAL WHO AGREES TO SERVE AS AN ADVOCATE FOR THE PARTY'S POSITION AND TO PROVIDE LITIGATION-RELATED SERVICES FOR COMPENSATION, IF THERE IS PROFESSIONAL NEGLIGENCE IN PROVIDING THE AGREED SERVICES?**

ANSWER: In the Affirmative by the Superior Court.

II. **ADDITIONAL SUBSTANTIVE QUESTION OF FIRST IMPRESSION: SHOULD THE SUPERIOR COURT OF PENNSYLVANIA BE PERMITTED TO ASSESS A PARTY COUNSEL FEES FOR APPEALING A CASE TO THE SUPERIOR COURT WHEN THE CONTROLLING AND DECIDING ISSUE IS AN ISSUE OF FIRST IMPRESSION, AND HAS NEVER (SIC) DECIDED BY THE SUPREME COURT OF PENNSYLVANIA?**

ANSWER: In the Affirmative by the Superior Court.

Appendix B

III. MAY THE TRIAL COURT AFFIRMED BY THE SUPERIOR COURT, MAKE A FACTUAL FINDING, ESSENTIAL TO ITS DECISION, WHICH IS NOT CONTAINED IN AND IS CONTRARY TO THE PLEADINGS OF APPELLANT-PLAINTIFF, WHERE THE ONLY FACTS BEFORE THE COURT ARE PLEADINGS, THERE HAVING BEEN NO TESTIMONY?

ANSWER: In the Affirmative by the Superior Court.

Supreme Court, U.S.
FILED
MAY 31 1996
CLERK

No. 95-1696

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

JOHN CHARNEY, ALICE CHARNEY, JOHN CHARNEY, JR., and BRIAN CHARNEY, a minor, by John Charney, his guardian,

Petitioners,

v.

ELAINE B. PANITZ,

Respondent.

On Petition for Writ of Certiorari to the Superior Court of Pennsylvania

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this case pursuant to 28 U.S.C. §1257(a) as well as Sup. Ct. R. 10.1(b) and 10.1(c).

REASONS FOR GRANTING THE WRIT

I.

PETITIONERS RAISED FEDERAL CONSTITUTIONAL ISSUES IN THE SUPERIOR COURT AND THE SUPREME COURT OF PENNSYLVANIA.

The Charneys did raise a federal constitutional issue in the Superior Court of Pennsylvania, which became the highest court in which a decision could be had, since the Supreme Court of Pennsylvania declined to exercise its jurisdiction in this case. The Constitutional issue was raised in the Brief for Appellants in the Superior Court and also in the Petition For Allowance of Appeal to the Supreme Court of Pennsylvania.

The constitutional claim was raised at several times in the Superior Court Brief:

> . . .The Charneys have been wronged, but their right to recover for tortious wrongdoing has been unconstitutionally eliminated.
>
> . . .This should not be the determining factor in destroying the party's constitutional right to redress for tortious wrongdoing.

> It is generally established in this Commonwealth, as in other states, that liability follows tortious wrongdoing. The lower Court's decision in this matter becomes significant because it effectively eliminates the Petitioners' right to recover for a tortious wrongdoing under these circumstances, in clear violation of the Pennsylvania Constitution, Article I, Section 11, and the Fifth, Seventh and Fourteenth Amendments of the United States Constitution.

In their Petition For Allowance of Appeal, the Charneys raised the constitutional issue once again:

> Ordinarily, a Superior Court decision on similar issues would be dispositive of the matter; however, circumstances exist in the present case as the two cases of Panitz v. Behrend and Charney v. Panitz are different enough to exist as separate lawsuits, yet they are closely tied enough to create a gross injustice if the Charneys are denied their day in court.

Also raised was the additional constitutional issue of the awarding of attorney's fees as unconstitutional in the Petition For Allowance of Appeal, which was the first opportunity Petitioner had to do so, since the attorney's fees were assessed by the Superior Court.

> For the same reasons, there is also a violation of Article I, Section 1 of the Constitution of the Commonwealth of Pennsylvania.
>
> It is asserted that the decision to award attorney fees to the opposition, the hired witness, is a violation of the 14th amendment of the United States Constitution, the due process clause.

The Charneys clearly raised a constitutional issue. The Charneys did not need to raise the issue in the "Statement of Questions Involved" as Respondent has set forth. A litigant is not bound to follow any particular form of words or phrases when raising a constitutional issue to a state court. As this Court has previously stated:

> No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928).

The Charneys raised a constitutional issue before the Superior Court of Pennsylvania and the Supreme Court of Pennsylvania. The Superior Court of Pennsylvania ignored the constitutional issue and failed to address it in its opinion, and the Supreme Court did not exercise its jurisdiction over the case.

II.

THE SUPERIOR COURT OF PENNSYLVANIA BECAME THE STATE COURT OF LAST RESORT WHEN THE SUPREME COURT OF PENNSYLVANIA DECIDED NOT TO EXERCISE ITS JURISDICTION IN THIS MATTER.

Under 28 U.S.C. §1257(a) the Supreme Court review of state court judgments by certiorari relates to final judgments rendered "by the highest court of a State in which a decision could be had. It is the discretion of the Supreme Court of Pennsylvania whether or not to review the judgments of the Superior Court of

Pennsylvania. If a review by the Supreme Court of Pennsylvania is sought and the Court does not exercise its jurisdiction, the Superior Court of Pennsylvania's decision becomes that of the highest court in which a decision could be had.

The basis for granting the Charneys' petition for certiorari exists on this basis.

III.

A CONFLICT DOES EXIST AMONG THE STATE COURTS CONCERNING THE CONSTITUTIONALITY OF EXPERT WITNESS IMMUNITY AS APPLIES TO EXPERTS.

The issue of the constitutionality of expert witness immunity existed in all the cases relied upon by the Charneys, Bruce v. Byrne-Stevens & Assoc. Eng., Inc., 113 Wash. 2d 123, 776 P.2d 666 (1989); James v. Brown, 637 S.W.2d 914 (Tex. 1982); Levine v. Wiss & Co., 97 N.J. 242, 478 A.2d 397 (1984); Matco Forge, Inc. v. Arthur Young & Co., 5 Cal.App. 4th 392, 6 Cal. Reptr.2d 781 (1992) and Murphy v. A.A. Mathews, 841 S.W.2d 671 (Mo. 1992), whether or not it was expressed.

Common law, as well as state statutes, may be reviewed by the Supreme Court of the United States to determine if they are in violation of the Constitution.

The Charneys are asking this Court to determine if it is unconstitutional for the courts of various states at common law to extend expert witness immunity to include the expert witness's statements and representations prior to their testifying. The Charneys' contend that extending expert witness immunity deprives litigants, who employ and depend on these experts, from recovering for injuries sustained from the negligence of the experts under the Due Process clause of the Constitution.

IV.

THIS COURT HAS NOT DECIDED THE CONSTITUTIONAL ISSUE OF EXTENDING WITNESS IMMUNITY TO INCLUDE STATEMENTS AND ACTIONS BEFORE TESTIFYING.

Respondent, relying on Briscoe v. LaHue, 460 U.S. 325 (1983), states that this Court has already decided that the utilization of witness immunity creates no constitutional violation. In Briscoe v. LaHue, the case was based on the perjured testimony of a police officer and brought under a claim pursuant to 42 U.S.C. §1983. This case was not brought under a claim pursuant to 42 U.S.C. §1983 and is not based on perjured testimony.

This claim is based on the statements and actions of an expert witness before testifying and is not based on any testimony given by the expert.

V.

GRANTING REVIEW OF THIS CASE WILL NOT RESULT IN CHAOS AND CONFUSION IN THE STATE COURTS OF ALL FIFTY STATES.

The granting of certiorari by this Court will not result in confusion or chaos in the courts of the fifty states. To the contrary, it will result in the uniformity of the courts on the issue of when expert witness immunity begins.

Expert witness immunity should not extend to the statements and actions of the expert witness before their actual employment begins, during preparation of reports, or during preparation for trial. Litigants depend on expert witnesses when considering the strength of their case and while preparing for trial. They should not be deprived of their due process rights, if the expert witness commits fraud or is negligent in the representation

of their skills, ability and actual "expertise".

VI.

AN ALTERNATIVE BASIS DID NOT EXIST FOR THE DISMISSAL OF EACH OF THE COUNTS OF THE AMENDED COMPLAINT INDEPENDENT OF EXPERT IMMUNITY.

The trial court dismissed the Charneys' case based on expert immunity only. It did not dismiss any of the Counts of the Amended Complaint based on any other grounds.

The Commonwealth of Pennsylvania encourages the trial court to allow amendments to Complaints. If there were deficiencies in the Amended Complaint, the trial court could have granted Petitioner the opportunity to amend their Complaint.

VII.

THIS COURT SHOULD REVIEW THE SUPERIOR COURT OF PENNSYLVANIA'S AWARD OF ATTORNEYS FEES.

The Superior Court of Pennsylvania awarded attorney's fees in this case without notification or hearing on the matter. To do so is in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and is contrary to this Court's Opinion in Roadway Express v. Piper, 447 U.S. 752 (1980).

The appeal in this matter was not in any manner frivolous. The Charneys' had appealed the trial court's decision to preserve their rights while the Petition for Allowance of Appeal in the Panitz v. Behrend, 632 A.2d 562, (1993) case, which the Superior Court had found controlling, was before the Supreme Court of Pennsylvania and not yet decided.

CONCLUSION

For all of the aforesaid reasons, the Charneys respectfully request the petition for a writ of certiorari be granted.

Respectfully submitted,

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Dated: May 30, 1996